United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,322

PERSIAN GULF OUTWARD FREIGHT CONFERENCE,

Petitioner,

v.

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA,

Respondents,

CONSTELLATION LINE, "HANSA" LINE, N.V. NEDLLOYD LIJNEN,
HELLENIC LINE, LTD., and CONCORDIA LINE,

Interveners.

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ON PETITION FOR REVIEW OF
FEDERAL MARITIME COMMISSION ORDERS

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QUESTION PRESENTED

Was the Federal Maritime Commission correct in finding that Agreement No. 8900 would not operate to the detriment of the commerce of the United States or be contrary to the public interest?

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*Cases chiefly relied upon are marked with an asterisk.

COUNTERSTATEMENT OF THE CASE

On November 9, 1962, six foreign water common carriers[1/] subject to the Shipping Act filed with the Federal Maritime Commission a conference agreement designated No. 8900 for approval under section 15 of the Shipping Act, 46 U.S.C. § 814. The agreement provided that the parties thereto would consult on freight rates for the trade between U. S. Atlantic and Gulf ports and ports on the Persian Gulf and adjacent waters in the range west of Karachi and northeast of Aden. The Persian Gulf Outward Freight Conference, whose membership consists of two American-flag carriers, Central Gulf Steamship Corporation and Isthmian Lines Inc., and which operates in the same general trading area, protested approval of the agreement. On April 14, 1965, the Commission issued its report and order approving the agreement.

Prior to World War II, three lines, Isthmian, Hansa and Strick-Ellerman, operated a conference in the Persian Gulf area which was disbanded when the war commenced. In 1945 another conference was organized, and it continued to operate until 1959. At that time conference membership consisted of all the lines involved in the present Commission proceeding (i.e. the foreign-flag applicant lines and the two American-flag

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1/ These carriers were the Concordia Line (Norwegian flag), "Hansa" Line (German flag), Hellenic Line (Greek flag), Nedlloyd Lines (Netherlands flag), Kulukundis Lines (Greek flag), and Kulukundis Maritime Industries, Inc. (American flag). Subsequent to the date of filing, Constellation Line (a Liberian company operating ships of Netherlands registry) became a party to the agreement and both Kulukundis Lines and Kulukundis Maritime Industries, Inc., ceased to be parties.

lines which comprise the Persian Gulf Conference), except Constellation Line and Stevenson Line. In that year Constellation Line, an independent, began operations in the trading area, carrying principally large quantities of automobiles at rates below those charged by the conference. Because the conference was unwilling to set rates that were competitive with Constellation, all of the foreign-flag carriers eventually resigned from the conference to secure the right to independently fix their rates. By February of 1960 only the two American lines, Isthmian and Central Gulf remained in the conference.[2/] As a consequence of the resignations, a rate war causing great rate instability ensued. The foreign lines then joined together and submitted Agreement No. 8900 to the Commission for approval.

In the proceedings before the Commission, the hearing examiner recommended that Agreement No. 8900 should be disapproved on the grounds that approval would lead to destructive competition between the conference carriers and the applicant carriers and that section 15 of the Shipping Act contemplated only one shipping conference in a given trade area. The Commission, however, approved Agreement No. 8900, subject to a condition not here material. The majority opinion was signed by two commissioners, one commissioner concurred separately, although he did not disagree on any point with the majority report. One commissioner dissented stating only that he would uphold the examiner's decision, and one commissioner did not participate.

2/ In 1963 Stevenson Lines, an American-flag carrier joined the conference, but has since resigned.

The Commission found that a rate differential existed between the rates charged by the conference carriers and the applicant carriers (JA 15); that the latter would not join the conference because of that differential and that they would not alter their stand in the future (JA 15); that there "is no substantial competition between applicants and the Conference in regard to either ports served, cargoes carried, rates charged or services to shippers" (JA 16); that "the competitive relationships among the five applicants is such as (a) to create unstable rate conditions, with no remedy,(b) to deprive shippers of a central source of rate information,and (c) to cause a possible loss of markets for American exporters if rates are induced to go to conference levels" (JA 21-22); and that there was no evidence that approval of Agreement No. 8900 would lead to increased strife and rate instability (ibid.). Upon these findings, and holding that the "existence of two rate making associations in a single trade, by itself, is not a valid test for disapproving agreements under Sec. 15" (JA 17), the Commission approved the agreement.

On April 30, 1965, the Commission gave final approval to Agreement No. 8900. On April 23, 1965, petitioner filed its petition to review which was subsequently amended by leave of court to include review of the Commission's order of April 30, 1965, as well as of the order of April 14, 1965. This Court denied petitioner's application for stay and interlocutory injunction (JA 29).

SUMMARY OF ARGUMENT

The Federal Maritime Commission is required by section 15 of the Shipping Act, 1916, to approve all agreements submitted to it which do not run afoul of the standards set out in the section. The section is silent on whether the Commission is restricted to approving only one conference agreement in a given trade, and the legislative history and case law lend no support whatsoever to petitioner's argument that the Commission is so restricted.

The Commission's decision under review was made on the evidence of record in the Commission proceeding and was not based on any report of a Congressional committee or a prejudgment of the case by any committee. The mere fact that the Commission's decision was filed after the report of the Douglas Committee referred to by petitioner lends no weight to petitioner's charge that the Commission was improperly influenced by the Committee. Petitioner's assertions do not overcome the presumption that the Commission as a public agency acted properly.

The decision approving Agreement No. 8900 is based on facts and findings that approval of the agreement will promote the commerce of the United States. Petitioner's argument that the Commission cannot approve a conference composed solely of foreign-flag carriers is without merit, for section 15 of the Shipping Act places no such limitation on the Commission's powers. The fact that the Commission has greater access to

records of American-flag carriers hardly supports the argument that the Commission may not approve agreements entered into solely by foreign-flag carriers.

The Commission's decision that approval of Agreement No. 8900 would not be detrimental to the commerce of the United States or contrary to the public interest is supported by the finding that there is no substantial competition between the parties to Agreement No. 8900 and the petitioner, based on cargoes carried, ports served, rates charged, and services performed for shippers.

Finally, the Commission was entitled to consider the evidence of record and make its own determination as to the approvability of Agreement No. 8900. The hearing examiner's decision that Agreement No. 8900 should be disapproved was advisory and formed a part of the record before the Commission, but the Commission was entitled to come to a different conclusion if that conclusion is supported by the evidence. In the instant case, the decision to approve Agreement No. 8900 is supported by the evidence of record.

ARGUMENT

I. The Requirements of Section 15 of the Shipping Act, 1916.

The Commission approved Agreement No. 8900 pursuant to section 15 of the Shipping Act, 46 U.S.C. § 814, (the text is set out as Appendix B-1 to petitioner's brief). That section provides that the Commission "shall approve all . . . agreements" which are not "unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States or to be in violation of this Act, ..." (emphasis added). The Commission has long recognized its obligation under this provision to approve all conference agreements unless there is a showing of discrimination, unfairness or detriment to the commerce of the United States. Alcoa Steamship Company v. CAVN, 7 FMC 345 (1962), aff'd sub nom. Alcoa Steamship Company, Inc. v. Federal Maritime Commission, 116 U.S. App. D.C. 143, 321 F.2d 756 (1963). And, this Court has recently stated the obligations imposed on the Commission by section 15. In Swedish American Line v. Federal Maritime Commission, decided June 10, 1965, this Court stated:

> We note that our country has adopted a policy, in the international transportation field, of encouraging, or at least allowing, United States carriers to participate in the steamship conferences, and to be governed by unanimity in respect of matters covered by conference agreements, barring disapproval under the standards prescribed by 46 U.S.C. § 814 . . . . To this end, Congress has provided in 46 U.S.C. § 814 that such steamship conference agreements are exempt from the provisions of the United States antitrust laws when approved

by the Federal Maritime Commission, that the Commission may disapprove an agreement only if it finds the agreement to be

> "unjustly discriminatory or unfair as between carriers . . . , or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter,"

and that it shall approve all other agreements. Slip Opinion, pp. 2-4.

II. Neither Section 15 Nor Its Legislative History Limits the Number of Approved Agreements Covering a Given Trade.

Petitioner argues that the Commission may not approve a second conference agreement in a given trade. While we recognize that usually there is only one conference in a given trade area, such a pattern is possible because of agreement among carriers serving the trade and a history of rate stability under the conference agreement. In the instant case, however, there has not been agreement among those who formerly constituted the only conference in the area, and rate stability has not prevailed. The pattern of one conference in the trade no longer follows as a matter of course.

Section 15 is silent as to any limitation on the number of agreements that may be approved in a trade; it states only that the Commission must approve all agreements unless it makes the findings set out in the statute. In Oranje Line et al. v. Anchor Line Limited et al., 5 FMB 714 (1959), the Commission's predecessor, the Federal Maritime Board, specifically rejected the argument that the statute prohibited more than one approved conference agreement in a trade:

> Complainants contend that the approval of more than one conference in a particular trade is illegal per se. This contention is not supported by the language of the Act nor by its legislative history. Oranje Line v. Anchor Line Limited, at 731.

Although the Board did not in fact approve a second conference, that decision was based upon the finding that a second conference would be detrimental to the commerce of the United States:

> In the face of evidence that approval of Agreement Nos. 8400 and 8440 in all likelihood would result in rate instability and rate wars, since the opposing parties are in some respects the same as were involved in the conflict detailed above in the Canadian seaboard-continental trades, we find that the approval of Agreements Nos. 8400 and 8440 would be detrimental to the commerce of the United States. Oranje Line v. Anchor Line Limited, at 732.

In the instant case, the Commission found that the existence of two conferences would not be detrimental to the commerce of the United States.

Finding no support in the language of section 15 or in case law for its argument that the Commission may not permit two conferences to operate in the same area,[3/] the petitioner resorts to legislative history. But the futility of that quest is demonstrated by the very general statements relied upon, the "implications" of which are supposed to support its argument. The fact is that none of the statements deal with the issue at hand. In general these statements assert nothing more than the rudimentary principle that shipping lines in a given area, or trade, may combine

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3/ Petitioner seeks to rely upon the 1961 amendment to section 15 of the Shipping Act. But that amendment merely relates to agreements between conferences, and certainly does not "necessarily" imply as petitioner would have it, that the Commission has no power to approve two conference agreements for the same trade.

into a conference. There certainly is no implication flowing from such statements that only one conference may be authorized in a trade area. 4/

Finally, petitioner's statement that "The policy of the administrators who process these applications is not to recommend approval of more than one rate agreement in a trade" (Pet. Br. p. 20) is simply erroneous. The policy of the Commission is to examine each agreement on its own merits and to decide the case on the basis of the criteria set forth in the statute. Indeed, to disapprove a second conference which is not found to be detrimental to the commerce of the United States, or in contravention of the other statutory criteria, on the ground of the policy argued for by the petitioner, would be for the Commission to transgress the statutory command that it shall approve all other agreements.

4/ Petitioner's legislative history argument appears to rest upon the assumption that the term "trade" meant a trade area in which only one conference could operate. It is evidence that the term "trade" carried no such technical connotation, since it was used in a variety of ways. Thus the Alexander Committee used the term "trade" in the following variations:

> (2) That all carriers engaged in the foreign trade of the United States, ... Alexander Report, p. 419.
> (6) That the use of "fighting ships" and deferred rebates be prohibited in both the export and import trade of the United States. Alexander Report, p. 421.
> Unlike the practice of water carriers in the foreign trade of the United States, agreements to divide the territory or charge certain rates in the domestic trade are few." Alexander Report, p. 421.

The term was not used with any precision by the Alexander Committee, nor has the subsequent use of the term detailed by petitioner (Brief, pp. 14-17) been any more enlightening. Indeed, the use of the term has become more imprecise through the years. "Trade" has become "service" (S. Rep. No. 2494, 81st Cong., 2nd Sess. (1950), at p. 84), which in turn has become "route" (H.R. Rep. No. 498, 87th Cong., 1st Sess. (1961) at p. 4).

III. The Commission's Decision Was Based on the Record and Evidence in the Commission Proceeding.

The Commission's decision was founded upon the applicable law and upon substantial record evidence in support of its findings (see infra). It is simply not true that the Commission's decision was dictated or influenced by the Douglas Committee Report.[5/]

The report and orders of the Commission contain no reference to the Report of the Douglas Committee referred to by petitioners,[6/] and there is nothing to corroborate petitioner's assertion that the Commission's decision was so influenced, other than the fortuitous facts that the Commission's decision was filed after the Committee Report and both concluded that there was no substantial competition between the parties to Agreement No. 8900 and the parties to the Persian Gulf Outward Freight Conference. Petitioner's assertion, moreover, does not overcome the presumption that the Commissioners as public officials acted properly. United States v. Chemical Foundation, 272 U.S. 1, 14-15; Lewis v. United States, 279 U.S. 63, 73; Pacific Westbound Conference v. United States, 332 F.2d 49, 53-54 (9th Cir. 1964). Finally, we submit that the fact that a few passages in the Commission's decision run parallel to a few passages in the Hearing

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5/ Sen. Rep. No. 1, 89th Cong., 1st Sess. (1965).

6/ Petitioner grasps for evidence of some connection between the two by pointing out that the Commission's decision was rendered some four months after the Douglas Report and some 11 months after oral argument. The 11-month interval for decision was not an unusual occurrence and is hardly evidence for petitioner's accusation of impropriety on the part of the Federal Maritime Commission.

Counsel's brief is hardly a basis for an inference that the Commission was in any way influenced by the Douglas Committee. Indeed the complete lack of connection demonstrates the vacuousness of the charge.

IV. The Commission's Approval of Agreement No. 8900 Promotes the Commerce of the United States.

The Commission's decision is replete with facts and findings that approval of Agreement No. 8900 will benefit the commerce of the United States. While such findings are not necessary to justify approval, they do negate the contention that the agreement will be inimical to the commerce of the United States. The Commission's findings are set out at p. 19 et seq. of the majority Report. The Commission found that approval would likely (1) result in lower rates to United States exporters and hence allow U. S. exporters the opportunity to participate in the trade in competition with foreign competing shippers;[7/] (2) decrease strife and instability;[8/] (3) prevent a potentially destructive competitive relationship between the parties to Agreement No. 8900 from developing;[9/] and (4) would further benefit American shippers by providing a central source of rate information.[10/]

7/ JA 21.

8/ JA 21.

9/ JA 21.

10/ JA 22.

The contention that Congress intended that the Commission not approve a conference composed solely of foreign-flag carriers that have broken away from a conference in which American-flag carriers participate is without foundation. Section 15 places no such restriction on the Commission's powers. Indeed the Commission found that approval of the second foreign-flag conference agreement will result in advancing the interests of the United States commerce. If, however, the American carriers in the Persian Gulf Conference find it to their advantage to become parties to Agreement No. 8900 they may do so, since Agreement No. 8900 contains standard provisions permitting any qualified steamship company to be admitted to the conference, regardless of the flag flown by the carrier. Moreover, American shipping interests are not likely to be injured by approval of an all foreign-flag conference since the foreign lines and American lines are not, as the Commission found, in effective competition.

Finally, it is not likely as petitioner contends (Pet. Br. p. 34) that the Commission's regulatory power over the parties to Agreement No. 8900 will be impaired because the conference is composed exclusively of foreign-flag carriers. The fact is that the Commission's regulatory power over foreign carriers is somewhat tenuous whether they be included in a conference with American carriers or not. While it is true that the Commission may be able better to police conference agreements to which American carriers are parties because of the greater accessibility of records pertaining to conference practices, that fact hardly demonstrates that Congress intended the Commission to refuse approval of conference agreements unless some American carriers are parties.

V. The Commission's Findings and Conclusions Are Supported by the Evidence of Record.

Petitioner's contentions that the Commission's findings are inconsistent and are not supported by the record are without merit. The ruling that approval of the agreement would not be inimical to the "commerce of the United States" rests in part upon the finding that there is no substantial competition between the American-flag carriers and the applicant carriers such as would injure the American carriers, and in part upon the benefit that will inure to American exporters. In making the finding as to the extent of competition, the Commission considered the cargoes carried by the respective groups of carriers, the ports they serve in common, the rates charged, and the services performed for shippers.

A. Cargoes carried.

The Commission found that there was little competition between the two groups of carriers as to the types of cargo carried. What competition does exist is not likely to have a significant impact upon the American lines. Only 26 percent to 38 percent of the total cargo carried by the American lines goes to ports in the Persian Gulf area. Of that cargo 60 percent to 70 percent is not open to competition from foreign-flag lines for the reason that it is government-sponsored freight which by law must move on American-registered ships. 11/ Thus, as the Commission found, the

11/ Section 901(b) of the Merchant Marine Act, 1936 (46 U.S.C. 1241) requires that government-financed cargo move on American ships to the extent possible. Public Resolution No. 17, 48 Stat. 500 and 10 U.S.C. 2631 require that cargo of the Agency for International Development (AID) and the Department of Defense move on American ships.

applicant carriers carry approximately 86.9 percent to 90.2 percent of the noncaptive commercial cargo.[12/]

In view of the Commission's finding that it was unlikely the applicant carriers would return to the Persian Gulf Conference, and the fact that those carriers generally offer lower rates, see infra, it is unlikely that the American lines could ever offer significant, effective competition for the remaining noncaptive commercial cargo. In this connection the Commission found:

> The protestants have no competitive need to reduce their rates because they neither serve the same ports to any extent nor carry similar commodities as cargoes because government cargo is carried on their ships (Facts, Nos. 7-9). In spite of lower rates, applicants' ships depart with free space, and in spite of higher rates, protestants depart with full ships, showing that rates are not a significant factor with respect to Conference cargoes and that other non-market factors influence relations between the carriers. (JA 18)

We submit that Commission approval of Agreement No. 8900 logically follows

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12/ Petitioner asserts that the Commission's Report is inconsistent on the question of what percentage of commercial cargo is carried by petitioner. This "inconsistency" results from a failure of the majority to adequately explain the contexts in which they determined the "inconsistent" percentages. The Commission first found that the parties to Agreement No. 8900 "carry about 86.9% to 90.2% of the commercial cargo in this trade . . . ." The majority should have said commercial cargo not including government-sponsored cargo. Later the Commission's report refers to the fact that "Protestants carry about 21% of the commercial cargo carried (Facts, Nos. 4-6)." In this context, the majority included government-sponsored cargo as commercial cargo. The failure to fully explain the use of the percentages did not lead to any erroneous findings or rulings by the Commission, and certainly not to prejudice to the petitioner.

from the findings made by the Commission and that the findings made by the Commission were founded upon substantial evidence.[13]

B. Ports served.

The Commission found that the Persian Gulf Outward Freight Conference and the parties to Agreement No. 8900 serve only six out of twenty-one ports in common.[14] Petitioner does not controvert this finding. This fact is further evidence of the difference in operations between the two groups of carriers.

Petitioner argues that the Commission should have considered percentages of calls rather than number of ports. Such a comparison would have been distorted by the larger number of carriers who are parties to Agreement No. 8900 vis-a-vis the two carriers in the Conference. The discrepancy would not be alleviated, as petitioner asserts, by using percentages; it would be increased.

C. Rates charged.

The Commission found that rate levels of the Agreement No. 8900 group and petitioner will never approximate each other.[15] Petitioner in fact

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13/ The burden of proving facts which would compel the Commission to make such adverse findings as would require disapproval of an agreement under section 15 rests not upon the parties to the agreement, but upon those who protest approval. See the Commission's Rules of Practice and Procedure, 46 CFR § 502.155, and section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 1006(c). Petitioner did not meet this burden before the Commission.

14/ JA 10.

15/ The basis of this conclusion is the finding that because of the presence of other carriers ready to transport at the same or lower rates, there is no practical basis for believing applicants will ever adopt higher conference rates. Nor is there any evidence that the conference will lower its rates.

admits (Pet. Br. p. 44) that "The rates offered by the American-flag lines are higher to a certain extent than the rates offered by the foreign flag carriers." The Commission therefore concluded:

> As a result of the higher Conference rates and the absence of any market compulsion for the two sides to have similar rates, there is no unjust discrimination or unfairness to shippers or exporters in the proposed Agreement, nor is there any possibility of rate instability caused by competition between the two groups resulting in detriments to commerce. (JA 18-19).

It follows as a matter of logic that the lower rate level maintained by the parties to Agreement No. 8900 would be beneficial to American shippers or exporters who ship in the trade.

D. Service to shippers.

The Commission found no basis for disapproval of Agreement No. 8900 due to differences in the quantity and quality of service by applicants. As stated by the Commission:

> The applicants and protestants provide entirely different service to shippers, and to the extent applicants are allowed to agree, better service will be provided. It was shown some of their ships have greater lifting capacity. Protestants are engaged primarily in transporting government-controlled cargo not available to applicants. Applicants will tend to provide shippers with uniform rate service through assurance of identical quotations and effective dates of rates. Exporters of commodities competitive with similar commodities shipped from foreign countries will have some assurance of more competitive rates (Facts, Nos. 8, 10, 11). (JA 19)

VI. The Commission Was Entitled to Make its Own Decision Based on its Reading of the Record.

Petitioner makes much of the fact that the majority Report of the Commission was not unanimous, and that the Commission, since it was not

unanimous was obliged to accord at least some weight to the hearing examiner's opinion. For the purposes of this case, the Commission consisted of four commissioners, since Commissioner Hearn did not participate for the reason that he was not a member of the Commission at the time (May 27, 1964) the Commission heard oral argument on the exceptions to the initial decision. Out of four commissioners, three supported approval. A reading of Chairman Harllee's separate concurrence reveals that it does not depart from the majority's reasoning in any respect; it is only a shortened version of the majority report. And, finally, Commissioner Barrett dissented without opinion except to note his concurrence with the examiner's decision.

The Commission's lack of unanimity is an irrelevant consideration to what weight the Commission should give to the hearing examiner's decision. Section 8 of the Administrative Procedure Act (5 U.S.C. § 1007) provides in part that:

> On appeal from or review of the initial decisions of such officers [hearing examiners] the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision.

Thus, the Commission is free to make its own decision based on its consideration of the evidence. The hearing examiner's decision forms a part of the record before the Commission and must be considered by the Commission, but the Commission is free to reach a result different from that of the hearing examiner.

CONCLUSION

For the reasons herein stated, we submit that the orders of the Commission should be affirmed, and that the petition to review should be dismissed.

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REPLY BRIEF FOR PETITIONER.

IN THE

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PERSIAN GULF OUTWARD FREIGHT CONFERENCE,

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FEDERAL MARITIME COMMISSION, *et al.*,

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ON PETITION FOR REVIEW OF FEDERAL MARITIME COMMISSION ORDERS.

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REPLY BRIEF FOR PETITIONER.

STATEMENT.

This brief is a reply to the briefs of respondents, Federal Maritime Commission and the United States of America, and intervenors, Concordia Line and Constellation Line *et al.* The Conference has endeavored to avoid, to the extent possible, repetition of arguments set forth in its opening brief.

The counterstatements of the case of respondents and intervenors are inaccurate in a number of respects. Petitioner's statement of the case in its opening brief represents its view of the matter. However, a few words should be said about statements by intervenors which are supported, not by reference to the Commission's decision, but by citations to the record.

While Constellation Line, *et al.*, admits that the Conference rates have remained the same since 1960 except for a 10% increase in 1963, it is not content with the Commission's view, not shared by the Examiner, that Con-

ference rates are presently 22 to 100% higher on certain commodities than rates of the 8900 group. It attempts to add an additional 15% to the Conference rates by postulating that the Conference will institute an exclusive patronage, dual rate, contract system under which shippers who choose to remain outside the system will be charged an additional 15%. Constellation Line admits that there is no dual rate contract system in effect at present, but in addition, it should be noted that the Federal Maritime Commission approved the institution of such a system by the Conference, in F. M. C. Docket No. 1079, *The Persian Gulf Outward Freight Conference Exclusive Patronage (Dual Rate) Contract,* 8 F. M. C. , 5 Pike & Fisher Shipping Regulation Reports 289 (1964).

The Constellation Line also asserts:

> "No shipper protested approval of the Agreement. In fact, testimony on the point established that shippers favored approval (Tr. 112, 152)."

Actually, no shippers testified at the hearings or intervened in Docket 1105(1). The citation to the record represents only self-serving testimony by 8900 group executives. The Arabian American Oil Company intervened in a companion case, F. M. C. Docket No. 1105, *Agreement 7700-6 Persian Gulf Outward Freight Conference,* but withdrew when the Conference satisfied its concern about Conference voting procedure. See Aramco's Letter to the Examiner of November 26, 1963 (JA 99).

ARGUMENT.

I.

THE COMMISSION MAY NOT APPROVE TWO RATE-MAKING AGREEMENTS IN THE SAME TRADE.

In response to petitioner's argument that the approval of Agreement No. 8900 in the identical trade covered by the Persian Gulf Outward Freight Conference was an

error of law because the standards set out in Section 15 of the Shipping Act, when read in the context of the legislative history of this provision, do not permit such an action by the Commission, Constellation Line *et al.* offers the now discredited plain meaning rule. They say:

> "There is no need to resort to legislative history. The appropriate scope of inquiry under Section 15 is stated clearly in the statute."

The plain meaning rule has, of course, now been laid to rest, *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U. S. 437, 444 (1955). In support of its position, Constellation Line *et al.* cite *Aktiebolaget Svenska Amerika Linien (Swedish-American Line)* v. *F. M. C.*, No. 13, 554, D. C. Cir., June 10, 1965. This case is also cited by respondents and by Concordia Line. The language quoted from that case by intervenors and respondents is undoubtedly correct, i. e., the Commission is bound to apply the standards set out in Section 15 of the Shipping Act, 1916. Nothing in the opinion, however, supports the statement of Constellation Line *et al.*, and the implications of respondents and Concordia Line, that the Commission must look only to the bare words set out in the statute. The Commission must construe the statute in the light of its legislative history. This is particularly true where, as here, the Act contains no definition of the terms and where the standards are not of themselves capable of exact definition. In *Securities & Exchange Commission* v. *Insurance Securities et al.*, 254 F. 2d 642, 648 (U. S. C. A., 9th Cir. 1958), the court said:

> "The act contains no general definition of these terms nor any provision to the effect that acts of a particular kind are comprised therein. The terms, however, are obviously intended to have some meaning and application. We must therefore find it by examining the scope and content of the act as a whole, and the pertinent legislative history. As the Supreme Court has said, when terms in a statute are not exactly defined, they 'derive much meaningful content from the purpose of the Act, its factual

> background and the statutory context in which they appear. * * *" American Power & Light Co. *v.* Securities and Exchange Commission, 329 U. S. 90, 104, 67 S. Ct. 133, 142, 91 L. Ed. 103."

Therefore, these standards must be construed in the light of the legislative history of the Act. As explained in petitioner's opening brief, the legislative history of the Shipping Act as originally enacted, as well as of the 1961 amendments thereto, clearly show that Congress did not intend by this provision to permit two rate agreements in the same trade.

Constellation Line *et al.* interprets this position to imply that the approved conference in a trade would thereby possess "a right good against all subsequent applicants no matter how much better for the public their proposed agreements might be." Not at all. The Commission can, of course, withdraw approval from any approved agreement, *Alcoa S. S. Co.* v. *F. M. C.*, 116 App. D. C. 143, 321 F. 2d 756, 760, n. 10 (1963).

Respondents and intervenors all reassert the dictum of the Commission in *Oranje Line et al.* v. *Anchor Line,* 5 F. M. B. 714, 731 (1959)[1] as quoted in petitioner's opening brief, p. 15, n. 4. The Constellation brief argues that this language is not dictum but holding. The language states that "approval of more than one conference in a particular trade" is not illegal, but the decision disapproved a second conference in the trade. The statement was not necessary for the decision in the case and hence is clearly dictum.[2] As

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[1] The Constellation brief attempts to bolster its view of the Oranje Line case by citing *Application of Red Star Linie for Conference Membership,* 1 U. S. S. B. B. 504, 508 (1935). This case hardly supports its position. The Board stated therein:

> "Thus to lend approval to the application of Red Star Linie, G.m.b.H., for membership in the conference as long as Arnold Bernstein Line or Arnold Bernstein, is a party to agreement 1456, would be sanctioning two agreements under section 15 in conflict with each other, contrary to public policy."

[2] The Constellation brief states that:

> "Petitioner did not assert before either the Examiner or the Commission that the Oranje case was wrong rather

then Associate Justice Miller said in *Noel* v. *Olds*, 78 U. S. App. D. C. 155, 138 F. 2d 581, 586, cert. den. 321 U. S. 773 (1943):

> "Obviously, the italicized words constitute obiter dictum, entirely unnecessary for the decision of the case; hence, they have no affect as indicating the law of the district."

Next, intervenors both argue the doctrine of legislative acquiescence. In *Campbell* v. *Brown*, 245 F. 2d 662, 664 (1957) the court said:

> "We think we should not impute to Congress any intent, by the re-enactment of the statutory provision, to adopt the construction evidenced by the former administrative practices. It is sometimes said that the reenactment of a statute without change gives an established interpretation the force of law. Such a rule, however, is no more than an aid in statutory construction. It is useful at times in resolving statutory ambiguities. It does not mean that it has become so embedded in the law that only Congress can make a change."

Furthermore, intervenors do not show that the decision was brought to the attention of Congress. The importance of this was pointed out in *Pacific Greyhound Lines* v. *Johnson*, 54 Cal. App. 2d 297, 129 P. 2d 32, 35 (1942):

> "• • • [B]ut such presumption • • • should not be too generally indulged in the absence of a showing that such construction or practice has been brought to the attention of the Legislature."

The only substantive comment by respondents on the legislative history set out in petitioner's brief relates to the meaning of the phrase "in the same trade" used throughout the discussion in Congress of this subject and in petitioner's opening brief. In respect to the legislative history, respondents claim in note 4 that the word "trade"

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that it was governing • • • The conference now changes tack • • •."

On the contrary, petitioner's position now, as below, is that the holding of the *Oranje* case—not the dictum—was correct.

was also used in the following contexts: "foreign trade", "export and import trade", and "domestic trade." This is not surprising but hardly illuminating. The fact that a word is used in several contexts to convey different meanings goes without saying. When the word was used in the phrase "in the same trade" in the contexts set out in petitioner's opening brief, it was used in the sense of "in the same service" or "on the same route." This again is obvious, and so it is not surprising that respondents can point to portions of the legislative history where its synonyms "service" or "route" were also employed.

In respect to the use of the phrase "in the same trade" in petitioner's opening brief, respondents point out that petitioner has also used the offending synonym "service." Synonyms are a characteristic element of English composition and serve to make more precise the sense in which each of the words is used, WOOLLEY & SCOTT, COLLEGE HANDBOOK OF COMPOSITION, ¶D4.2 (4th Ed. 1944). Respondents' contentions are without weight.[3]

The Constellation brief argues that the Conference and the 8900 group are not in the same trade, but it does not controvert the finding of the Examiner shown on page 35 of petitioner's opening brief that the Conference lines compete for all cargo in this trade, and the Conference's position, explained on page 34 of the opening brief, that the Conference agreement approved by the Commission covers the establishment of agreed rates on commercial cargo and that the Conference tariff offers a full schedule of rates on commercial cargo. Both agreements cover the

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[3] Concordia Line contends that the legislative history set out in petitioner's opening brief errs in not stating that the sole device which Congress chose for the purpose of strengthening the conference system in 1961 was the exclusive patronage, dual rate, contract system. Actually, the dual rate system established by Section 14b, added to the Shipping Act in 1961, was but one of the changes instituted at that time. The Constellation brief, indeed, points out that "the lengthy examination by Congress of shipping conferences * * * culminated in extensive amendments in 1961 (75 Stat. 762-766), including restatement of Section 15." The most cursory glance at the legislative history of the 1961 amendments shows that Congress did not limit itself to consideration of dual rate contracts in its examination of the Shipping Act.

same geographical area. Both agreements cover the same cargo. Both agreements cover the same trade.

Petitioner explained in its opening brief, pp. 14-15, that the Commission has never approved two rate agreements in the same trade and that as to the many agreements which are approved without hearing, it is the policy of the administrators who process applications not to recommend approval of more than one rate agreement in a trade.

Respondents point to no trade in which two competing rate-making agreements have been approved. Intervenors cite four instances. Their citations do not support their position. In *Alcoa S. S. Co.* v. *C. A. V. N.*, 7 F. M. C. 345, *aff'd.* 116 U. S. App. D. C. 143, 321 F. 2d 756 (1963), the Commission approved a pooling agreement, not a rate making agreement. In *Agreement No. 8765—Gulf/Mediterranean Trade* 7 F. M. C. 495 (1963), the Commission approved an agreement between the Conference carriers and the independent lines in a trade. Adm. Harllee characterized this as a "side agreement" in his concurring opinion, as petitioner pointed out on page 14 of its opening brief. Respondents and intervenors have not responded to this discussion. In *The Dual Rate Cases*, 8 F. M. C. —, 3 Pike & Fisher Shipping Regulation Reports 677, 712-713 (1964), the Commission approved a dual rate contract for use between the carriers and shippers. No stretch of the imagination could make this a rate-making agreement.[4] In *Application of Red Star Linie for Conference Membership*, 1 U. S. S. B. B. 504, 508 (1935) the existence of two approved rate agreements is indeed indicated. As we have seen, *supra*, this led the Commission to disapprove one.

Thus, petitioner's statement stands, the Commission has not approved two competing rate making agreements in the same trade.

The only response to petitioner's point that it is administrative policy not to approve two competing rate-making

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[4] The Constellation brief claims that the Commission approved two dual rate contracts at the cited pages. Actually, it approved only one since the other contract was withdrawn by its proponents, 3 Pike & Fisher Shipping Regulation Reports 737 (1964).

agreements in the same trade, is a blanket denial by respondents. They have not chosen to support their statement by references to trades in which the approval of two rate making agreements has been recommended.

In its opening brief, in addition to explaining how the legislative history of the Shipping Act, 1916 gave meaning to the standards set out in Section 15, the Conference, on pp. 13-14, also pointed to specific language, added in 1961, which was based on the principle that only one conference was to be approved in each trade.

Intervenors do not respond in any way to this position. Respondents deal with this point in note 3. Their response is:

> "But that amendment merely relates to agreements *between* conferences and certainly does not 'necessarily' imply as petitioner would have it, that the Commission has no power to approve two conference agreements for the same trade."

This is a puzzling response. The language of Section 15 in question is "no agreement shall be approved • • • between • • • conferences of carriers serving different trades that would otherwise be naturally competitive." The use of the phrase "serving different trades that would otherwise be naturally competitive" necessarily implied that there would be only one conference serving each different trade. Otherwise, the words "serving different trades" would be unnecessary and would limit the application of the phrase in a way contrary to the intent of the provision. This is shown by the Senate debates on the provision as the Conference explained on p. 14 of its opening brief.

II.

The Commission's decision was an abuse of its discretion.

The threshold response of Constellation Line to petitioner's point that this decision was in abuse of the Commission's discretion because it was not based on the

Commission's own judgment but rather on the unjustified asumption that it was the will of Congress that this agreement be approved, is the contention that this argument now comes too late. The idea is that, even though the issue did not arise until the Commission's decision was issued, review on this point is barred by the doctrine of exhaustion of administrative remedies. Petitioner, the argument runs, should have petitioned for reconsideration on this point. Its citations do not support the argument. Both *United States* v. *Tucker Truck Lines,* 344 U. S. 33 (1952), and *Niesloss* v. *Bush,* 110 U. S. App. D. C. 396, 293 F. 2d 873 (1961) are inapplicable because in those cases, the issues involved could have been raised before the final decision. *Gearhart & Otis, Inc.* v. *S. E. C.,* No. 18,817, D. C. Cir., June 30, 1965, did involve an issue which could only have been raised after the issuance of the final decision. However, the quotation from this case in the Constellation brief refers to other issues which could have been raised at an earlier point. As to the issue that could only have been raised after the Commission's decision, the Court said:

> "We are aware, of course, that Section 10(c) of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. §1009(c), provides that "agency action otherwise final shall be final" for judicial review whether or not reconsideration is sought. But this language of Section 10(c) is preceded by: "Except as otherwise expressly required by statute." Thus Section 25(a) of the Exchange Act prohibiting court consideration of objections to Commission orders unless first "urged before the Commission" would apply to an objection arising after agency decision since such objection may be the subject of an application for rehearing pursuant to the Commission's rules." *Gearhart & Otis, Inc.* v. *S. E. C.*, ... U. S. App. D. C. ....., ... F. 2d ..... (No. 18,817, decided June 30, 1965), slip op. 5.

Obviously then, the Court recognized that in accordance with Section 10(c), where *not* otherwise expressly required by statute, no petition for reconsideration is necessary for review of final agency actions. No statute requires, expressly or otherwise, a different procedure in regard to

review of Federal Maritime Commission actions. See 3 DAVIS, ADMINISTRATIVE LAW §20.08 (1958), THE ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 103-104 (1947), *National Labor Relations Board* v. *General Teamsters Local Union No. 324*, 296 F. 2d 48, 50 (1961), *National Labor Relations Board* v. *Jones & Laughlin Co.*, 331 U. S. 416, 428 (1947).

Respondents also offer a preliminary technical argument. They assert the presumption of regularity which applies to Government officials. This is a routine argument familiar to all reviewing courts, *Amarillo-Borger Express* v. *United States*, 138 F. Supp. 411, 417 (1956). Certainly, the Court cannot close its eyes to the situation presented here. The initial decision in this case was issued on March 10, 1964 and oral argument was held on May 27, 1964. No decision came from the Commission until after the Douglas Report was released[5] noting the pending proceeding, making findings of fact in detail as to it, and clearly indicating the decision that should be reached by the Commission. Then, on April 14, 1965, the Commission issued its decision reversing the Examiner and approving the agreement upon the same erroneous findings and for the same reasons as those contained in the Douglas Report. The Commission's decision came eleven months after the oral argument and four months after the Douglas Report. Adm. Harllee has shown the Commission's deference to the Douglas Committee in testimony quoted on page 17 of petitioner's opening brief. The four-month delay between the release of Douglas Report and the issuance of the final opinion approximates the usual delay between oral argument and the issuance of a final decision and the eleven-month delay is unexplained and highly unusual.[6]

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[5] The Constellation brief apparently admits that the Douglas Report's findings were not based on testimony but on Hearing Counsel's brief to the Examiner in this proceeding. It says that Hearing Counsel's brief "is cited specifically by the Committee as the source of the quotations." This admission is important. However, we fail to find the citation referred to.

[6] In note 6, respondents say, without more: "The 11-month interval for decision was not an unusual occurance * * *." It was highly unusual, clearly, and a blanket denial does not effectively challenge this point.

The presumption of regularity does not require that the Court shut its eyes to reality. It is highly improbable, to the point of disbelief, that the Commission reached its decision by the exercise of its own judgment. As was said in *Old Colony Bondholders* v. *New York, N. H. & H. R. R. Co.*, 161 F. 2d 413, 443-445 (C. C. A. 2d Cir. 1947):

> "Such a striking coincidence certainly demands a rational explanation. * * * True, an improbability, adequately explained, would not warrant reversal; for the improbable—by definition being not impossible—sometimes does occur. The highly improbable, however, does call for considerable explanation. * * * A court, remarked Judge L. Hand, is not obliged to close its eyes 'and assume a credulity which no sensible man can * * *'.
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> "So here: Because of the so-called 'presumption' that public officials do their duty * * * the Commission's discussion * * * would have been sufficient as expressive of the broad outlines of its reasoning—*if* that Report had not been preceded by its previous Reports." (Frank C. J., dissenting in part.)

In this case, the Commission's decision must be read in the light of the Douglas Report that preceded it, Adm. Harllee's statement before the Douglas Committee, and the strange delays experienced in this proceeding. In the light of these facts, the situation is clear.

In substantive response to petitioner's position, intervenors both contend that the Douglas Report does not suggest any course of action for the Commission because the ultimate phrase, "if they are not checked by a Conference breakup" does not refer to the future but to the past, i.e., the departure in 1960 from the Conference of the foreign-flag lines. This is simply nonsense. The Douglas Report refers to the agreement filed by the foreign-flag lines, notes that the case is pending, and uses quotations from Hearing Counsel which clearly refer to the future not the past. The full paragraph in which the Douglas Report recommends a Conference breakup appears on page 17 of petitioner's opening brief. The first sentence reads: "There are three American-flag conference lines serving the Persian Gulf."

There could have been no doubt in the Commission's mind what conference the Report was referring to or to what period its remarks applied.

The response of the respondents to this fact situation, on the other hand, is another blanket denial. It says that the facts are "fortuitous." As Judge Frank pointed out in the *Old Colony* case, *supra*, "Such a striking coincidence certainly demands a rational explanation." Respondents have nothing to offer.

Respondents also have nothing to say about the legal arguments advanced in petitioner's opening brief on this point. Constellation Line says that *F. C. C.* v. *RCA Communications, Inc.*, 346 U. S. 86 (1953) and *U. S.* v. *New York Central R. Co.*, 263 U. S. 603 (1924) "are irrelevant, for petitioner here does not attempt to explain how the standard supposedly substituted for the agency's expertise and judgment differed from that set forth in the governing statute." This comment is made in apparent complete disregard of petitioner's opening brief. The Commission must apply the standards of the Act, and nothing else, and come to an independent decision. That is the teaching of these two cases, and the remainder of petitioner's analysis of the law, and that is what the Commission has failed to do here.

The only new legal reference used by the respondents or intervenors as to this point is in note 7 of the Constellation Line brief. It quotes a law review article to the effect that some Congressional interference with Administrative action is proper. The author, however, limits his statement in the very quotation set out by Constellation Line. He says:

> "Thus, *aside from the merits of controversies* OBJECTION IS NOT APPROPRIATE . . ." (Italics supplied by petitioner).

Here, the fact that the Douglas Committee has gone deeply into the merits of this controversy is at the heart of petitioner's position. The citation, therefore, strengthens rather than detracts from petitioner's point.

III.

THE COMMISSION'S DECISION WAS ARBITRARY AND CAPRICIOUS.

The response of intervenors to petitioner's point that it was the intent of Congress to benefit the U. S. Merchant Marine when it enacted the Shipping Act, 1916 so that this decision is arbitrary and capricious because approval of this agreement has directly opposite effect,[7] takes two forms. First, it is said that the American-flag lines cannot be injured and second, that petitioner's construction of Section 15 is false. The injury to American-flag lines is definite and certain. As the Concordia brief admits, "petitioner's sailings dropped sharply after intervenors left the Conference." The Examiner found:

> "By 1961, Isthmian had lost about two-thirds of its patronage and Central Gulf about 60%. In 1959 and in prior years, Central Gulf had three and four sailings a month to the Persian Gulf. This dropped to 1.75 for Central Gulf and 1 for Isthmian by 1961". (JA 41).

The approval of the Agreement, as the Examiner found, will freeze the status quo in a condition clearly prejudicial to the American-flag lines in the trade. Moreover, in its discussion of this point, the Constellation Line brief obviously contemplates that the Agreement may well capture for the 8900 group some of the 30 to 40% of the conference carryings which is commercial cargo.

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[7] Both the Constellation brief, in note 8, and respondents, in note 1, refer to the fact that an American flag line was originally a sponsor of Agreement No. 8900. The line referred to is Kulukundis Maritime Industries, Inc. Its relationship to Kulukundis Lines Ltd., a Greek flag line also an original sponsor of Agreement No. 8900, is obvious. See *In The Matter Of Kulukundis Maritime Industries, Inc.* (S. D. N. Y., No. 63 B 237, pending report of Ref. Edward J. Ryan). Given this relationship, it is not surprising that this American-flag line carried 98% Government-sponsored cargoes, since commercial cargoes would have been carried in competition with its foreign-flag relative. However, the Constellation Line reference to this percentage in connection with note 12 as the carryings of "another American-flag line in the trade", without more, is misleading.

The Constellation response to the legislative history set out in petitioner's opening brief which shows that Congress intended to benefit the U. S. merchant marine by the enactment of the Shipping Act is first, that the quotations involved refer to the promotional provisions of the Shipping Act. That the legislators were talking about the regulatory features of the Act, and not other provisions dealing with ship construction is clear from the statements set out on page 23 of petitioner's opening brief in which Rep. Alexander refers to "regulations", Rep. Rowe refers to "a shipping board whose duties shall be to regulate shipping", and Rep. Saunders refers to "the authority with which the board must be endowed."

Next, the Constellation brief says that in any event, the regulatory provisions were designed to be enforced equally. This statement is true as far as it goes, but the standards of the Act were intended themselves to afford American-flag vessels *equality of opportunity to compete* in spite of their higher operating costs, as is shown by the statements set out on pp. 24 and 25 of petitioner's opening brief. Finally, Constellation Line suggests, as do respondents,[8] that there is nothing to show that the departure of foreign-flag lines from an approved conference to form their own conference was considered contrary to the purposes of the Act. That this was considered and disapproved by the House of Representatives is indicated by the colloquy between Rep. Casey and Mr. Wierda set out on pp. 25-26 of petitioner's opening brief.[9]

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[8] Respondents misread Sen. Engle's point, fully explained in petitioner's opening brief, pp. 26-27, that it is important that foreign-flag lines and American-flag lines be in the same conference. He was not there concerned with the Commission's ability to investigate, but with its ability to enforce compliance when it disapproves an agreement and orders it disbanded.

[9] The Senate also considered this problem as can be seen from the Senate Report, as follows:

> "This, together with other important considerations, impelled us to reject three provisions of the House bill, each apparently designed to encourage nonconference foreign flag lines, eligible but unwilling to join approved and regulated conferences to stay out of the conferences, to cut con-

The Government brief, in answer to this point and the Constellation Line in the final section of this brief, assert that in any event, "the Commission's decision is replete with facts and findings that approval of Agreement No. 8900 will benefit the commerce of the United States." This is but one of the standards which must be considered by the Commission and as explained in petitioner's opening brief, there is no evidence in the Commission's decision that it balanced this standard against the fact that this agreement will operate to the detriment of the American Merchant Marine. Nor is there any recognition that the American merchant marine is itself an important part of our commerce.

The Constellation brief then reasserts its argument that Reorganization Plan No. 7 of 1961 is somehow relevant to this issue. As petitioner pointed out on page 27 of its opening brief, this contention was rejected in *Alcoa S.S. Co.* v. *C. A. V. N., supra.* The brief's artful allusion to the Court's rejection of this point is ingenious but not convincing.[10]

IV.

THE DECISION IS NOT IN ACCORD WITH THE RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE.

It is significant that intervenors' response to petitioner's discussion of the facts found by the Commission is not limited to a defense of the Commission's findings. Intervenors are not satisfied with the Commission's work either. Throughout their discussion, they bypass the decision and go directly to the record to prove, essentially, not that the

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ference rates and thereby to obtain a disproportionately large share of the available cargo.

* * * * * *

"Therefore, any provision designed to encourage foreign flag lines to stay out of Board-approved conferences and cut conference rates would be seriously inimical to our American merchant marine and, in the absence of some compelling showing to the contrary, clearly adverse to the public interest." S. REP. No. 860, 87th Cong., 1st Sess., (1961) p. 3.

[10] Apparently to bolster this argument, the Constellation brief then quotes from the report of the House Antitrust Committee, H. R. REP. 1419, 87th Cong., 2d Sess. (1962). The Shipping Act, of course, came under the purview of the House Merchant Marine & Fisheries Committee.

Commission was correct, but that it could have, in their view, found other facts which would have supported its conclusions.

It is well settled that it is not the task of the Court on review to search the record to see if basic findings could have been made that would have supported the Commission's ultimate finding.

> "The Commission's action cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order as an appropriate safeguard for the interests protected by the Act. There must be such a responsible finding." *Securities & Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80, 94 (1942).

Furthermore, it is not the task of the reviewing Court to assemble the basic findings made into a logical pattern from which ultimate finding of the Commission follows. This is the responsibility of the Commission.

> "The findings of the Commission must be at least sufficiently simple and clear as not to leave the Court in the position of being compelled to spell out, to argue and to choose between conflicting inferences. United States *v.* Chicago, Milwaukee, St. Paul & Pacific R. Co., 294 U. S. 499, 510, 55 S. Ct. 462, 79 L. Ed. 1023." *Inland Motor Freight* v. *U. S.*, 60 F. Supp. 520, 524 (D. C. E. D. Wash. 1945).

The Commission has failed to do its job in this case.

a. Cargoes Carried

Both intervenors and respondents admit that the Commission found that the foreign-flag lines carried 86.9% to 90.2% of the total commercial cargo to the Persian Gulf and that the American-flag lines carried 21% of the total commercial cargo, see respondents' note 12 and Constellation note 13. Their elaborate discussions of what the Commission should have said are beside the point. The Commission heavily relies on the fact that, in its view, petitioners do not compete for commercial cargo and yet its finding in this regard is obviously incorrect: The percentages stated add up to more than 100%. The conclusions as to cargoes carried thus cannot stand.

b. Ports Served

As to ports served, respondents say:

> "Petitioner argues that the Commission should have considered percentages of calls rather than number of ports. Such a percent would have been distorted by the larger number of carriers who are parties to Agreement No. 8900 vis-a-vis the two carriers in the conference. The discrepancy would not be alleviated, as petitioner asserts, by using percentages; it would be increased."

Respondents comment is completely puzzling. The illogic of its statement is striking and yet it leaves this extraordinary statement without more, without any further explanation. In determining whether a group of five carriers is in competition with a group made up of two carriers, where the five carriers offer a greater number of voyages to the Persian Gulf, as Constellation Line admits in its counterstatement of the case, the necessity for mathematical analysis would appear to be clear. To merely add up the total calls of the two groups is simply to decorate a foregone conclusion with important-sounding statistics. More lines and more voyages means more calls, of course. But the fact that the smaller group, with fewer voyages therefore, has a smaller number of calls, does not mean that it is not in competition with a larger group.

Looked at in terms of mathematical analysis, however, it can be seen that 69.1% of the calls in the trade area by foreign-flag lines were at ports which American-flag lines also served and conversely that 86.7% of the calls in the trade area by American-flag lines were at ports which foreign-flag lines also served. The two groups are in competition as to ports served.

But the question still remains whether particular outports within the Persian Gulf were considered by the Commission to be the relevant market in which to judge the extent of competition. The first step in deciding the question of whether two groups are in competition is to decide the relevant market. This is a procedure familiar in antitrust cases where the question of the extent of competition arises. But it is not, as the Constellation

brief would have it, an "antitrust trade" concept but rather a logical requirement which necessarily arises when the question of competition is in issue. This first step is not discussed by the Commission. But, if it did select particular ports served as the relevant market, it erred. The Commission should have considered the Persian Gulf as a relevant market, since that is the area covered by both agreements, rather than particular ports served in 1962-1963. The Commission's conclusions as to ports served thus cannot stand.

c. Rates Charged

In regard to rates charged, not content with the Commission's finding, with which the Examiner did not agree, that "most commodities in tariff schedules show differentials from 15% to 25%" and that "rates of protestants on commodities most frequently carried are from 25% to 100% higher than those of the applicant" (JA 12),[11] intervenors both insist on implying an additional 15% because the petitioner has been authorized to use an exclusive patronage dual rate contract. In addition, they insist on emphasizing the 10% increase which the Conference instituted in 1963, in spite of the fact that the Examiner found that a similar increase was effected at the same time by services to neighboring destination areas (JA 41), and in spite of the fact that Concordia Line admits in its summary of argument that there has been a "drastic cost increase." It can be seen that intervenors have little confidence in the findings of the Commission when they go to such lengths outside of the Commission's decision, to bolster them.[12] This lack of confidence is further shown by

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[11] It is interesting that the Commission is not even consistent here. At times, this figure is "25% to 100%" (JA 12) and at times, it is "22% to 100%" (JA 18).

[12] In addition to a quibble contained in note 14, which has been fully answered (JA 63), the Constellation brief cites in this section, in note 15, an initial decision of an Examiner in another agency, the Maritime Administration. This is an initial decision in a very complicated inquiry into Trade Routes 10 and 13 and even if his decision were ultimately affirmed, which is doubtful, it would not be applicable here.

the many references made to the record, in this section of their two responses, to establish other points not found by the Commission. We have seen that arguments of this sort are irrelevant. The Commission's conclusions as to rates charged cannot stand.

d. Service to Shippers.

As to service to shippers, the difference in the approach of respondents and intervenors is interesting. On the one hand, Constellation Line says that the Commission's decision as to service to shippers is "supported by the facts as to ports served, cargoes carried and rates charged." Concordia's brief adopts a similar approach. The intervenors thus apparently concede that the Commission's finding that the 8900 group and the Conference do not compete as to service to shippers is not in accord with the evidence, because the Commission does not base its finding, as to service to shippers, on ports served, cargoes carried and rates charged, but rather on various forms of service which it found, erroneously, were performed better by the 8900 group. The intervenors make no effort to defend these service factors, preferring to fall back on ports served, cargoes carried and rates charged. To defend such findings by reference to other factors previously discussed by the Commission is to implicitly admit that this additional justification for finding the two groups not in competition cannot be defended in itself.

Respondents, on the other hand, make an effort to defend the Commission. It amounts to a single sentence followed by the quotation from the summary of the Commission's discussion. The Commission's decision as to this point is discussed on pp. 36-8 of the petitioner's opening brief. The mere quotation of the Commission's decision is not adequately responsive to petitioner's position and yet, this is all the proponents of the decision have to offer. The Commission's finding as to service to shippers thus cannot stand.

e. Ultimate Finding.

Because respondents and intervenors have in general followed the format of petitioner's opening brief, it is significant that none of the replies offers a response to petitioner's discussion of the Commission's erroneous ultimate finding that there is substantially no competition between the Conference and the 8900 group. The facts show that these two groups are in competition and, as the Examiner pointed out in a passage quoted on pp. 38-39 of petitioner's opening brief, this has always been the case. In fact, the existence of competition between the two groups would seem to be obvious in the light of the Commission's own narrative report and the evidence pointed out by the Examiner, and this Court should correct the Commission's error.[13]

In *Stanislaus County, California* v. *United States,* 193 F. Supp. 145, 148-9 (N. D. Cal. N. D. 1960), on review of an Interstate Commerce Commission order dismissing a complaint that railroad rates favored one area over another,

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[13] In respondents' note 13 and Constellation Line's note 4, the argument is made that in any event, the burden of proving facts which would compel the Commission to disapprove Agreement No. 8900 rests with petitioner. Section 7(c) of the Administrative Procedure Act, 5 U. S. C. §1006(c) and the Commission's Rules of Practice and Procedure, 46 C. F. R. §502.155 are cited in support of this statement. Petitioner does not have any such burden. Both the statute and the rules place the burden on the "proponent of the rule or order."

The Commission's order of June 7, 1963 instituted this proceeding in the following terms:

> "THEREFORE, IT IS ORDERED, that a proceeding into the matter of approval of Agreement 8900 is hereby instituted pursuant to Sections 15 and 22 of the Shipping Act, 1916, to determine whether Agreement 8900 should be approved, disapproved or modified."

Clearly, the Commission had to issue an order approving, disapproving or modifying the Agreement. Thus petitioner is no more the "proponent of the rule or order" than is the 8900 group. In *Alcoa Steamship Co.* v. *C. A. V. N.,* 7 F. M. C. 345 (1962), the Commission, in such a case as this, specifically declined to rule on the burden of proof and upon that issue, this Court, on review, affirmed the Commission, *Alcoa S. S. Co.* v. *F. M. C.,* 116 U. S. App. D. C. 143, 321 F. 2d 756, 761 and n. 15 (1963).

the court remanded the case to the Commission because the Commission's finding that the two areas were not in competition was not consistent with the narrative report contained in the decision. The court said:

> "In several respects the significance of statements contained in the ICC report is difficult to grasp in the light of the record. For example, the applicability of the statements that, 'General declarations as to competition, unsupported by evidentiary facts, and a mere showing of disparity of rates do not establish undue prejudice' and that there must be a 'proven competitive relationship', is not clear. The narrative report of the ICC repeatedly shows the existence of competition.
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> • • • • • •
>
> "It is undisputed that Stanislaus County is actively seeking industry, which in many cases locates in 'preferred area' sites instead of locating in Stanislaus County. This fact clearly establishes the existence of competition between the two areas."

Upon review of the order arising from the remanded proceeding, the court again set aside the order with directions to the Commission to take action consistent with the court's opinion, basing its decision on the evidence pointed out by the Examiner. In *Stanislaus County* v. *United States*, 236 F. Supp. 146, 151 (N. D. Cal. N. D. 1964), the court said:

> "The majority of the Commission found that plaintiffs' evidence did not establish sufficient competition to create an inference of prejudice, but rather that a contrary inference resulted. With all due deference to the expertise which the Commission possesses in these matters, we cannot find any reasonable support in the evidence for these findings.
>
> "The evidence discloses, and the proposed report of Examiner John A. Russell points out, numerous instances of competition between points in Stanislaus County and points in the preferred areas which are not intermediate along existing railroad lines to San Francisco, as well as instances of actual injury to the county in failure to attract industry or to the indus-

> tries located in the county by the imposition of higher rates. While the proposed report of the Examiner is not binding on the Commission, it is entitled to consideration by the Court on the issue of substantiality of the evidence (Wilson & Co. *v.* N. L. R. B., 8 Cir., 123 F. 2d 411, and A. E. Staley Mfg. Co. *v.* N. L. R. B., 7 Cir., 117 F. 2d 868).
>
> • • • • • •
>
> "The basic findings of the Commission as stated in its order provides no rational basis for the ultimate finding reached."

The situation in this case is similar in many respects, in the light of the Commission's own narrative report and the facts of record pointed out by the Examiner. The Commission's finding that there is substantially no competition between the two groups cannot stand.

The Commission claims: "Lacking any conflicting competitive conditions, the basic premises of the initial decision vanish." (JA 17). The two groups are in competition, the Examiner's premises have not "vanished" and the Commission should have found, as did the Examiner, that Agreement 8900 should be disapproved.

V.

Examiner's decision was ignored.

Both intervenors and respondents offer only a blanket denial to petitioner's point that where only two members of the Commission signed the report and one member dissented, the fact that the majority reversed the Examiner on almost every finding has a material bearing upon the question of whether the Commission's findings are substantially supported. In all cases, this blanket denial is unsupported by citations to legal authority or any comment on the cases relied on by petitioner. The only legal response is repetition of the truism that the Commission is not bound by the Examiner's report, a point recognized in both *Wyman-Gordon Co.* v. *N. L. R. B.*, 153 F. 2d 480, 483 (C. C.

A., 7th Cir. 1946) and *A. E. Staley Co.* v. *N. L. R. B.*, 117 F. 2d 868, 878 (C. C. A., 7th Cir. 1941), the cases quoted by petitioner in support of its point on pp. 39-40 of its opening brief.

The Commission, instead of considering carefully the Examiner's decision under these circumstances, has virtually ignored it. The strange response of intervenors to this point is to interpret the Examiner's disapproval of the Agreement to turn on a single point, "because the Examiner hoped that this would force the non-conference carriers to join the conference", and to interpret the Commission's decision as resting on a rejection of that point. It is noteworthy, first, that the brief does not cite the reader to the Examiner's decision to support its view of what the Examiner said, but to the Commission's decision—not the best source of information on the Examiner's decision in this case, and second, that this "rationale" seen by intervenors is not mentioned in respondents' description of the Examiner's decision on the second page of their counterstatement of the case.

The Examiner did find that the approval of the Agreement would prevent or appreciably diminish the possibility of the independent lines rejoining the Conference (JA 52) and petitioner considers that he was correct in his view but, equally important, the Examiner found that approval of this Agreement between carriers competing with the established conference would create instability in the trade and perpetuate an unsatisfactory situation regarding rates and service. The Commission devoted by far the greatest portion of its decision to demonstrating, to its satisfaction, that the two groups were not in competition and rejected Examiner's reasoning with the words: "Lacking any conflicting competitive conditions, the basic premises of the initial decision vanish" (JA 17). In doing so, it simply ignored the facts relied on by the Examiner and his reasoning, in favor of an independent and erroneous analysis of the case. Considering the fact that the majority decision is only signed by two commissioners, the Examiner's decision

now has a material bearing on the question of whether the Commission's findings are substantially supported.

Respondents claim that:

> "A reading of Chairman Harllee's separate concurrence reveals that it did not depart from the majority reasoning in any respect; it is only a shortened version of the majority report."

Why then did Adm. Harllee not sign the majority report? Furthermore, since he did not sign it, how can the Commission's decision be sustained in the absence of any satisfactory rationale commanding the support of a majority of the agency.

In *Interstate Commerce Commission* v. *New York, N. H. & H. R. Co.*, 372 U. S. 744, 751 (1963), the Supreme Court had before it a decision in which only five of the ten commissioners signed the majority report and a sixth concurred, stating that he was "in general agreement with the majority report;" but making some additional comments. The Court said:

> "In view of our disposition of this case, it is not necessary to consider whether, in light of Commissioner Hutchinson's concurrence, the 'majority report' in fact represented the views of a majority of the Commission and, if not, whether the Commission's decision could be sustained in the absence of any rationale commanding the support of a majority of the agency. Cf. *Securities & Exchange Comm'n.* v. *Chenery Corp.*, 318 U. S. 80." 372 U. S. at 751, n. 8.

The Supreme Court did not find it necessary to decide this question in that case but it seems to be squarely presented here. Can the concurrence of Adm. Harllee be used in support of the detailed factual findings of the majority when he specifically divorced himself from those findings and ultimate conclusions in favor of a separate statement of the case? We think not.

Conclusion.

For the foregoing reasons, Petitioner prays that this Court:

1. Hold that the Commission's report and final orders of April 14th, 1965 and April 30th, 1965 were without basis in law and contrary to Section 15 of the Shipping Act, 1916, as amended;

2. Vacate the Commission's decision and remand the Agreement to the Commission with instructions to disapprove proposed Agreement No. 8900;

3. Grant such other and further relief as the Court may deem appropriate.

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BRIEF FOR INTERVENOR CONCORDIA LINE

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19322

PERSIAN GULF OUTWARD FREIGHT CONFERENCE,

Petitioner,

—against—

FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR REVIEW OF FEDERAL MARITIME COMMISSION ORDERS

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STATEMENT OF QUESTIONS PRESENTED

Intervenor Concordia Line joins in the Statement of Questions Presented set forth in the brief of intervenors Constellation Line et al.

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SUMMARY OF ARGUMENT

The applicable statute clearly permits the Commission to approve two rate-making bodies in the same trade. Indeed, the statute (Section 15 of the Shipping Act) which governs approvability of this Agreement 8900, actually requires the Commission to approve Agreement 8900 unless the Commission can find the Agreement to be unjustly discriminatory or unfair, detrimental to commerce, contrary to the public interest or in violation of the Act. Neither the text of the statute nor its legislative history supports the petitioner's assertion that a rate agreement can or should be disapproved merely because there is another rate agreement in the trade.

As for the effect of Agreement 8900, petitioner's brief and the record both utterly lack any showing as to how Agreement 8900 could cause injury to petitioner. Most of the commercial cargo is carried by intervenors (petitioner's member lines concededly priced themselves out of the market); this has been the case since early 1960 when intervenors individually left petitioner's conference; petitioner's loss of the commercial cargo market to intervenors took place before, not as a result of, the Agreement, and neither reason nor the record permits the conclusion that approval of the Agreement would worsen petitioner's competitive position or that disapproval would enhance petitioner's competitive position.

To the contrary, Agreement 8900 was designed to reduce rate instability among intervenors and to permit the working out of common problems with shippers; these objectives are fully comportable with the statutory standards, as the Commission found. Without an agreement intervenors individually have been free to reduce rates; this ability is certainly not enhanced by the Agreement. However, without an agreement intervenors were unable to

stabilize rates, or to increase them (even when necessitated by a drastic cost increase); this disability is changed by the Agreement, and obviously this change can have the effect only of ameliorating (rather than aggravating) the competitive situation vis-a-vis petitioner.

The Commission correctly found that the Agreement met the statutory tests for approvability, and held that whether or not full conference participation might be more desirable (as the Examiner concluded), such a value judgment is not a basis for disapproving an agreement.

With respect to the alleged improper influence of the Douglas Committee, the Court will see that although the Douglas Report did comment on certain facts in the record herein, it gave no indication whatever as to any desired result in this proceeding. What the Douglas Committee "approved", so far as intervenors are concerned, was not the Agreement but intervenors' individual actions in reducing rates after they left petitioner Conference—actions which occurred years before the Agreement was even proposed.

Intervenor Concordia Line joins fully in the position taken in the brief filed on behalf of the other intervenors herein; this brief of Concordia is intended to be supplemental thereto.

In the Argument which follows, petitioner's points are answered in the same order as presented in petitioner's brief.

ARGUMENT

I.

The Statute Permits Commission Approval of Two Rate-Making Bodies in the Same Trade

Contrary to petitioner's contention, Section 15, Shipping Act, 1916, 39 Stat. 733, 46 U. S. C. 814, the statute gov-

erning approvability of Agreement 8900, in no way forbids approval of two rate-making agreements in the same trade. Section 15 by its terms requires approval of carrier agreements unless they are unjustly discriminatory or unfair, detrimental to commerce, contrary to the public interest or violative of the Act; the language of the statute nowhere contains any prohibition (which petitioner seeks to read in) against a second rate-making agreement in the trade.

As this Court has recently held:

> "The statutory language authorizes disapproval [of a carrier agreement] only when the Commission finds as a fact that the agreement operates in one of the four ways set out in the Section by Congress." *A/B Svenska Amerika* v. *F. M. C.*, — F. 2d —, No. 18,554, D. C. Cir. June 10, 1965)

The legislative history of Section 15 and its amendments likewise utterly fails to support petitioner's contention. Petitioner has, quite obviously, thoroughly combed the history of the original enactment of Section 15 by the 64th Congress, but has been unable to present to this Court a single statement that only one rate-making body may be approved. When the 87th Congress reviewed and amended Section 15 in 1961, it made no such statement either in statute or committee report* (see Index, Legislative His-

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*It is true, as petitioner suggests, that an important purpose of the 1961 amendments to the Shipping Act was to strengthen the conference system. However, the device which Congress chose for this purpose was not the outlawing of more than one conference in a trade but the "dual rate" (exclusive patronage) contract system (see Shipping Act, 1916, Section 14b, as added by Public Law 87-346, 75 Stat. 762, 87th Cong., 1st Sess.). In fact, during the pendency of Agreement 8900, petitioner sought and was granted Commission approval to use such a dual rate contract (*Persian Gulf Outward Freight Conference—Dual Rates*, F. M. C. Docket No. 1079, 8 F. M. C.— [August 31, 1964]).

tory of the Steamship Conference Dual Rate Law, Sen. Doc. No. 100, 87th Congress, 2d Sess.).

Moreover, two years before the 1961 Congressional revision of the Shipping Act, the Federal Maritime Board, in *Oranje Line* v. *Anchor Line,* 5 F. M. B. 714 (1959), considered the approvability of two rate-making bodies in a single trade. There the Federal Maritime Board expressly stated that approval of more than one conference in a particular trade was not illegal *per se* (id. at 731). If this statement were at odds with basic Congressional intent, it would have been perfectly simple for Congress to say so in 1961, yet no such amendment was ever considered, much less enacted.

The Commission properly interpreted the statute to permit disapproval of the agreement only upon a showing that it was unjustly discriminatory, detrimental to commerce or contrary to the public interest, none of which could be found upon this record.

II.

The Contention That The Commission Decision Resulted From The Douglas Committee Report Is Groundless

It is unnecessary for purposes of this case to discuss the effect of Congressional attempts to influence a pending administrative agency adjudication, because, contrary to petitioner's contention, it is evident that the Douglas Committee did not make either a "decision" or an "indication" (Pet. Brief, p. 23) that it desired any specific result in this proceeding.

What petitioner finally asserts to be the objectionable "decision" of the Douglas Committee is the following statement:

> "It also proves that regular commercial rates are increased as the result of cargo preference laws, and

> *if they are not checked by a conference breakup,* may destroy commercial exports of the United States to a particular trade area." (Emphasis supplied) (Pet. Brief, p. 23, quoting Sen. Rep. No. 1, 89th Cong. 1st Sess., 1965, p. 38)

It is apparent that what the Douglas Committee "approved" is not Agreement 8900—as to the merits of which the Committee Report is silent—but rather the "conference breakup" and the subsequent lowering of rates, all of which took place in 1960, three years before Agreement 8900 was even proposed. The issue in this proceeding (and under the statute) was not whether the 1960 conference breakup should be approved or disapproved but rather whether Agreement 8900 should be approved. On the only issue in the proceeding—whether the agreement should be approved or not—the Douglas Committee Report gives no indication, express or implied, as to its judgment.

III.

The Commission's Decision Was Not Arbitrary Or Capricious

Petitioner asserts that the Commission's decision is arbitrary and capricious because it allegedly does not benefit the U. S. Merchant Marine; in other words, petitioner asserts that Section 15 ought to be so construed that the Commission must always decide disputes in favor of American carriers, whether or not the agreement reviewed violates the standards stated in the statute.

Even if it were to be construed that Section 15 was designed to prefer American carriers (a conclusion which could scarcely be supported by its text), petitioner has not shown that approval of the Agreement will in any was dis-

criminate against petitioner's members or will have any detrimental effect on them.

So far as discrimination is concerned, membership in Agreement 8900 is open to any carrier, including petitioner's members (Agreement 8900, Par. 4, JA 81, 90).

With respect to detrimental effect on petitioner's members there is neither evidence nor argument to show how this would flow from the Agreement. Petitioner's entire contention in this respect is contained in the following statement:

> "This trend is exemplified by the success of the foreign-flag lines in capturing so much of the commercial cargo in this trade, a success which the Commission stamps with approval and perpetuates by approving this agreement. The effect of this trend in the Persian Gulf trade is shown by the departure of Stevenson Lines." (Pet. Brief, pp. 37-38)

The capture of most of the commercial cargo—to which petitioner objects—resulted from intervenors' independent rate competition, not from the Agreement (which became effective only after commencement of this appeal). This was conceded by petitioner's own witness, who testified:

> "I say we've lost practically all the blood we're going to lose right now * * *" (Tr. 407) [i.e., *before* approval of the Agreement].

There was no showing—not even a suggestion—in petitioner's brief how the Agreement would aggravate this situation. The conclusion that Agreement 8900 will not aggravate the situation is inescapable, in that intervenors are able to reduce rates below petitioner's whether or not intervenors can agree among themselves on rates. On any rational basis, the privilege of rate-fixing among intervenors (per-

mitted by the Agreement) could be expected not to result in further rate reductions, but instead to result in stabilized or increased rates—a result which could now only alleviate, rather than aggravate, petitioner's competitive position.

Conversely, disapproval of the Agreement could not in fact help petitioner's members. The Conference lines long ago priced themselves out of the market (JA 90, 93; Tr. 91, 132, 152, 270-71). They did not lose their market by virtue of Agreement 8900, and disapproval of the Agreement will not make petitioner's members competitive.

The frivolous nature of petitioner's contention is graphically shown by its reliance on the experience of Stevenson Lines. Stevenson entered the trade in the Summer of 1963, not a whit deterred by the fact that the non-conference lines were charging substantially lower rates (JA 93-94); then Stevenson left the trade, *before* Agreement 8900 went into effect. (Affidavit of I. G. Ellis, sworn to May 6, 1965, annexed to petitioner's Application for Stay herein, dated May 8, 1965). Nothing could show more clearly than petitioner's own Stevenson illustration that petitioner's grievance has no relation whatever to the real or fancied effects of Agreement 8900.

IV

The Decision Is Supported By Substantial Evidence

Petitioner's Point IV amounts to nothing more than a semantic exercise revolving about the word "competition".

Petitioner seeks to make it appear that the Commission's decision rested on a finding that there was no competition between petitioner and intervenors. But in fact the Commission did not find that there was "no competition" at all between petitioner and intervenors; it found that there was "no *substantial* competition" (Finding 3, JA 16; emphasis supplied).

The basic and undisputed fact is that the Conference lines had priced themselves out of the market for commercial cargo (JA 90, 93)—had "lost practically all the blood" (Tr. 407)—before Agreement 8900 was effected. With petitioner's rates being 22-100% higher on principal commodities and at least 15% higher on other commodities (JA 12-13) it is inconceivable that petitioner could offer any substantial competition for commercial cargo.* Additional foundation (if any be required) for the Commission's finding that petitioner offered no substantial competition to intervenors, lies in the fact that in September 1963 petitioner instituted a general rate increase (Tr. 511; JA 15, 41), an action drastically inconsistent with the existence of substantial or meaningful competition with intervenors.

With respect to the allied considerations of competition as to service and ports, even the Hearing Examiner, upon whom petitioner relies so heavily, found that petitioner's sailings dropped sharply after intervenors left the conference (JA 41) and that "with the decrease in patronage after 1959, the conference lines decreased the number of calls at outports in the Persian Gulf area * * * some of the outports did not justify a call." (JA 42).

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*This was conceded by the Conference witness:

"Q Do you know, sir, how the Concordia rate on those items [commercial cargo] compares with your own?

A Not off-hand; no. I don't know off-hand, but I presume it's lower.

Q What would the reason be why those goods [commercial cargo] are shipped via your line at the higher rate?

A I would say this, that *there is a very small amount of cargo moving, some of which we carry, that where our rate isn't necessarily always the prime consideration,* there may be the consideration of delivery time; there may be the preference on the part of a shipper to use an American flag ship; there may be the good experience he has had with the line that perhaps could bring him back, *but as I say, it's very small;* the volume is fairly small." (Tr. 416; emphasis supplied)

The Commission was fully warranted in concluding that on the facts in the record there was no substantial competition between petitioner and intervenors.

V.

The Examiner's Decision Was Properly Reversed By The Commission

The principal areas of disagreement between the Hearing Examiner and the Commission* lie not in finding facts but in drawing conclusions and in applying the statutory standards.

In these areas, the Examiner was clearly wrong. The Examiner erroneously equated the interests of petitioner freight conference with the public interest of the United States; the Commission properly rejected this premise as totally unauthorized by the statute. The Examiner concluded that approval of the Agreement would lead to increased strife and rate wars; this conclusion was correctly rejected by the Commission as being based solely on speculation and supposition, contrary to both reason and the facts in the record.** The Examiner concluded that approval of the Agreement would substantially lessen the chances of intervenors rejoining the conference; this conclusion was correctly rejected, both as extraneous to the statutory standards and as contrary to the irrebuttable fact that "A history of 4 years' operations outside the Confer-

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*Regardless of differing views of a hearing examiner and the agency on the evidence, the question for the reviewing Court remains "whether there is a substantial evidentiary basis for the findings of the Commission." *Mueller Co.* v. *F. T. C.*, 323 F. 2d 44, 45 (7th Cir. 1963).

**It is noteworthy that on this appeal petitioner has cited no evidence in support of the Examiner's speculative conclusion.

ence is more convincing than unsupported speculations that there is a possibility of rejoining the Conference." (JA 20)

In essence, the error in the approach taken by the Hearing Examiner is summed up in the following statement by the Commission:

> "Agreements must be approved 'unless we find them contrary to the provisions of that Section [Section 15]', *Alcoa Steamship Co.* v. *CAVN, 7* FMC 345 (1962) aff'd 321 F. 2d 756 (D. C. Cir. 1963). Full conference participation may be more desirable, but such a value judgment is not a basis for disapproving an agreement. Agreement No. 8765, *Gulf Mediterranean Trade, 7* FMC 495, 499 (1963)." (JA 20)

Or, as Chairman Harllee put the position in his concurring opinion, the Commission "may accept a pragmatic, and somewhat less than ideal, solution in order to effect stability. * * * Currently, our approval of Agreement No. 8900 will serve the immediate needs of the trade" (JA 26-27). The pragmatic solution adopted by the Commission is supported by the record and accords with the statute.

CONCLUSION

For the reasons stated, Intervenor prays that the petition for review be denied.

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BRIEF FOR INTERVENORS, CONSTELLATION LINE,
"HANSA" LINE, HELLENIC LINES, LTD.,
N. V. NEDLLOYD LIJNEN

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,322

PERSIAN GULF OUTWARD FREIGHT CONFERENCE,
Petitioner,

v.

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA,
Respondents,

CONSTELLATION LINE, "HANSA" LINE, N. V. NEDLLOYD
LIJNEN, HELLENIC LINE, LTD., AND CONCORDIA LINE,
Intervenors.

On Petition for Review of
Federal Maritime Commission Orders

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October 12, 1965

STATEMENT OF QUESTIONS PRESENTED

Intervenors believe the only questions presented on this record, including petitioner's brief, are these:

In acting on a request to approve under section 15, Shipping Act, 1916, a rate agreement among ocean carriers operating from the United States to the Persian Gulf:

(1) Was the Commission required as a matter of law to disapprove the agreement because a prior Commission-approved rate-making group (i.e. petitioner) served the same trade area, despite the fact that the Commission found that the second agreement would promote American commerce and be in the public interest?

(2) Does the fact that the Joint Economic Committee of Congress, after public hearings and before the Commission's decision, published a report criticizing A.I.D. for acquiescing in paying petitioner's members much higher rates than those charged by intervenors, require this Court to reverse the Commission decision, where there has been no showing that the Joint Economic Committee sought to, or did influence the Commission's decision, or that the Committee's criticism was based on an erroneous understanding of the facts or of congressional policy; and if the issue is meritorious, should petitioner have raised it first with the Commission when it had the opportunity?

(3) Was the Commission required to attempt to promote two American lines at the expense of shippers and other carriers when there was no finding that approval of Agreement 8900 would have any adverse effect upon the American lines who had not joined it?

(4) Was there sufficient evidence to support the Commission's finding that because of lack of substantial competition between the parties to the two rate-making agreements and the advantages accruing to American shippers from approval of the second agreement, it could not be held that the second agreement was detrimental to commerce or contrary to the public interest within the meaning of section 15?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,322

PERSIAN GULF OUTWARD FREIGHT CONFERENCE,

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FEDERAL MARITIME COMMISSION and
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CONSTELLATION LINE, "HANSA" LINE, N. V. NEDLLOYD LIJNEN, HELLENIC LINE, LTD., AND CONCORDIA LINE,

Intervenors.

On Petition for Review of
Federal Maritime Commission Orders

BRIEF FOR INTERVENORS, CONSTELLATION LINE, "HANSA" LINE, HELLENIC LINES, LTD., N. V. NEDLLOYD LIJNEN

COUNTERSTATEMENT OF THE CASE

1. **The Order Under Review.** Petitioner, Persian Gulf Outward Freight Conference, seeks review of a Report and Order of the Federal Maritime Commission, dated April 14 and April 30, 1965, respectively,

approving an agreement designated "No. 8900" pursuant to section 15, Shipping Act, 1916, 39 Stat. 733, as amended 75 Stat. 763 (1961), 46 U.S.C. § 814. Intervenors, Constellation Line, "Hansa" Line, Hellenic Lines, Ltd., N. V. Nedlloyd Lijnen, and Concordia Line are the signatories to that approved Agreement and were respondents before the Federal Maritime Commission (hereinafter "Commission").[1] A motion to intervene was granted by this Court (JA 100).

2. **Agreement 8900.** Agreement 8900 is a cooperative working arrangement authorizing steamship lines who are signatories to the Agreement to meet with each other and shippers to discuss and agree on mutually acceptable freight rates to be offered shippers in the export trade from U.S. Gulf and Atlantic ports to destinations in the Persian Gulf (JA 80-84). The objective of the Agreement is to insure stability and acceptability of ocean freight rates to American shippers exporting their goods to Persian Gulf markets and to prevent destructive competition (JA 21-22). The Agreement, *inter alia*, permits any carrier in the trade to become a party to the Agreement without admission fee or security deposit; it contains provisions for arbitrating disputes among the parties; it requires reporting to the Commission all actions taken under the Agreement; and it sets forth a procedure whereby any shipper having a grievance or request may communicate such grievance or request to the signatories to the Agreement and receive a prompt response (JA 80-84).

3. **Background of Trade — Rate Instability.** In 1959, four of the present five carriers who are signatories to Agreement 8900 were members of the petitioning Persian Gulf Conference (the conference operates under an approved agreement which also permits consultation on rates in the export trade from United States — and Canadian — ports to Persian

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[1] During the proceeding below, the parties to Agreement 8900 were frequently referred to as the "applicants" or "independents" as distinguished from the carriers of the Conference. The designation "8900 lines" will be used herein.

Gulf destinations). During the latter part of 1959, a new steamship line inaugurated a competitive service to Persian Gulf ports offering rates to shippers below those rates being offered by the conference. This new steamship line attracted and obtained cargo from shippers who previously had been shipping on conference lines. The conference could not agree to reduce its rates to meet this new competitive carrier and, therefore — in early 1960 — four members of the conference resigned from it in order to enable them to quote rates competitive with the new outside competition (JA 14). The four lines that resigned are presently signatories to Agreement 8900. Only two carriers, Central Gulf Steamship Corp. and Isthmian Lines, Inc., remained in the conference when the others left. These two lines, both American-flag carriers, have remained in the conference to this date.

As soon as the four lines left the conference in 1960, a violent and deleterious rate war ensued. Rate conditions among them became highly volatile and unstable. The conference, however, did not participate or reduce its rates (JA 91).

In November of 1962, the four lines who left the conference, together with two other lines — Kulukundis Lines, Ltd. and Kulukundis Maritime Industries, Inc. — submitted Agreement 8900 to the Commission for its approval. Shortly thereafter, the latter two lines withdrew from the trade and the Agreement, and Constellation Line was added as a party (JA 6).

4. **Comparison of Service: Petitioner and Intervenors.** The most significant evidence introduced below was statistical data from each carrier detailing a full year's operations. This evidence, to which no objection was or has been entered, presents a clear comparison of the services offered to U.S. exporters by the 8900 lines as opposed to the conference.

First, the conference relies upon Government-sponsored cargo required by law to be shipped in American-flag bottoms.[2] Its own estimate was that 60 per cent to 70 per cent of its Persian Gulf cargoes are such reserved Government cargoes (JA 11-12). Since intervenors are foreign-flag carriers, they cannot compete for these Government cargoes. The 8900 lines do, however, carry 90 per cent of the commercial cargo available in this trade (JA 12).

Second, on an annual basis, the 8900 lines offer more voyages to the Persian Gulf than petitioner's members and make calls at significantly more Persian Gulf ports (488 calls versus 83) (JA 8-9).

Third, of 21 ports of call in the Persian Gulf, the 8900 lines serve 19 of them, while petitioner serves 6 (JA 8-9). Even more significant, the 8900 lines made 320 stops at ports visited on only three occasions by conference vessels (*Ibid*).

Fourth, the 8900 lines' vessels departing from U.S. ports for the Persian Gulf consistently have space available for more cargo, a situation frequently a prelude to rate instability (JA 91). In contrast, the vessels of petitioner departing U.S. ports, with rare exception, have no space for additional cargo (JA 14).

5. Comparison of Divergent Rate Structures: Petitioner and Intervenors. The exhibits and tariffs of all parties show that there is a significant and fundamental difference in the rates offered American exporters by the two groups: on the commodities most frequently moving in the trade, petitioner's members' rates are 22 to 100 per cent higher than those offered by the 8900 lines (JA 13). (This does not take into account petitioner's expressed intention to raise its rates a further 15 per cent to American exporters unwilling to enter into a dual rate contract to patronize its members exclusively (JA 92)).

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[2] The statutory authorities are the Cargo Preference Act, 68 Stat. 332 (1954), 46 U.S.C. §1241(b); Public Resolution 17, 73rd Cong., 48 Stat. 500 (1934), 15 U.S.C. §616a; and 10 U.S.C. §2631, 70A Stat. 146 (1956) reserving all military cargoes.

There are two reasons why intervenors must carry cargo at lower rates. First, the major commodities moving to the Persian Gulf from ports in the U.S. are also exported to the same Persian Gulf buyers from foreign sources of supply, principally Western Europe and Japan (JA 14-15, 87-88). Uncontradicted evidence establishes that transportation charges play an important consideration in determining where Persian Gulf buyers make their purchases. Higher rates would serve to discourage U.S. sources of supply resulting in a loss of business to intervenors (JA 14-15, 18). Second, if freight rates become too high, new ocean carriers which provide disruptive hit-and-run competition enter the trade, resulting in loss of cargo as happened in 1959 and uncertain, unstable rates for exporters (JA 14, 18).

In contrast, the conference carriers have no incentive to offer reduced rates (JA 18). Since it is unlawful for common carriers to transport Government cargo at rates above those being offered for commercial cargo, if it reduces its rates in an attempt to obtain commercial cargo, it must reduce its rates on the bulk of its cargo (Government cargo) (See 10 U.S.C. § 2631). The conference carriers have not reduced their rates. Instead they instituted a general rate increase of 10 per cent after Agreement 8900 was under review (JA 41).

The conference admits that it does not attempt to compete with intervenors on a rate basis (JA 18, 93). There was general agreement that the rates being charged by intervenors afford a marginal return (JA 44), whereas conference carriers admitted that the trade was profitable for them (JA 98); their method of operation being to carry large blocks of Government cargo to a few ports at substantially higher rates than those paid by commercial exporters who use the 8900 lines.

6. **Agency Proceedings — Examiner's Decision.** After notice in the Federal Register of Agreement 8900, petitioner Persian Gulf Conference intervened in the Commission's hearing opposing approval of the Agreement (JA 6). The conference was alone in its opposition. No shipper protested approval of the Agreement. In fact, testimony on the point established that shippers favored approval (JA 88, 95).

The Commission's Hearing Counsel urged approval of the agreement before the Examiner and the Commission (JA 39, 7).

The Examiner, on March 10, 1964, issued his decision recommending that the Commission disapprove Agreement 8900. He made no specific finding that the conference would be injured by the Agreement; that is, he pointed to no loss of cargo or revenue of petitioner which might flow from approval of the Agreement. Instead, the Examiner concluded that it would be preferable if the 8900 lines joined the conference (JA 54-55). Since he felt that disapproval of the agreement would force the 8900 lines into conference membership — although their testimony was precisely the opposite — he recommended disapproval (Compare JA 54-55 and JA 86-87, 89, 90).

7. **Agency Proceedings — Commission Decision.** On April 14, 1965, the Commission issued its report reversing the Examiner and on April 30, entered an order approving Agreement 8900. Three members of the Commission voted to approve the Agreement (one filing a concurring opinion). One Commissioner dissented without opinion, and one Commissioner did not sit.

The Commission found that the Examiner's hope that disapproval of Agreement 8900 would force the 8900 lines into the conference had no factual support, and in any event, was an erroneous legal interpretation of section 15 (JA 7, 19, 21). The Commission then proceeded to a detailed analysis of the testimony and the uncontroverted statistical exhibits. The report of the Commission is replete with supporting citations to the record and exhibits for its factual determinations. After measuring the Agreement against every conceivably relevant proscription enunciated in section 15 — some of which were not raised by any of the parties or the Examiner — the Commission found the Agreement fully compatible with the statutory standards. Indeed, the Commission found affirmatively that the Agreement would promote the commerce of the United States (JA 23).

8. **Denial of Stays by the Commission and This Court.** On April 22, 1965, the conference petitioned the Commission for a stay of the order approving Agreement 8900. On April 30, 1965, the Commission denied the stay (JA 66).

On May 8, 1965, petitioner filed an application for stay with this Court alleging, among other things, that Agreement 8900 would cause petitioner irreparable injury and that petitioner was likely to prevail on the merits when the appeal was heard. This Court heard oral argument on May 12, 1965, and on that same day issued an order denying the application for a stay (JA 29).

SUMMARY OF ARGUMENT

I.

Section 15 of the Shipping Act, 1916, does not declare a second rate-making agreement in the same trade unlawful *per se*. The statute sets out the standards by which Congress intends the Commission to assess agreements, and none other. There is nothing in the legislative history stating that two agreements are unlawful, and there are no cases, judicial or agency, so holding. To the contrary, the leading precedent expressly holds that two rate-making entities in the same trade are not unlawful *per se*. *Oranje Line v. Anchor Line, Ltd.*, 5 F.M.B. 714, 731 (1959). The Commission is not bound by an inflexible rule of law, but must weigh a proffered second agreement's effect on our commerce and the public interest, in accordance with its statutory mandate.

II.

Petitioner's contention that the Commission's decision was improperly influenced by a part of a report of the Joint Economic Committee of Congress should not be considered by this Court. No such argument was ever presented to the Commission although petitioner had ample opportunity to set this issue before the Commission. Petitioner thus failed to exhaust its administrative remedies and is precluded from

arguing that issue here. A recent decision of this Court is dispositive on this point. *Gearhart & Otis, Inc. v. S.E.C.*, No. 18,817, D.C. Cir., June 30, 1965. Furthermore, there is no mention of the Committee's report in the Commission's decision and no evidence whatever that the Commission considered the report. The report, moreover, takes no position on the merits of Agreement 8900.

III.

There is no evidence that petitioner's members — two American-flag carriers — will be injured, or even affected, by approval of Agreement 8900. There is no evidence or allegation that petitioner's members will be driven from the trade or even that they will lose any customers, cargo, or revenue due to Agreement 8900. Apart from the lack of injury, petitioner asserts the erroneous legal proposition that section 15 affords American carriers favored treatment. The legislative history of section 15 as well as the Commission's decisions reiterate the only just approach that can be taken under section 15: the Commission is guided by the standards set forth in the statute which afford due and equal, not favored, consideration to all carriers regardless of flag. This petitioner has received.

IV.

The Commission's finding of lack of substantial competition between the 8900 lines and petitioner's members, and therefore of the improbability of a rate war between them, is supported by the evidence. The Commission found that petitioner's members serve few of the ports served by the 8900 lines; petitioner's members carry predominantly Government preference cargoes, for which the 8900 lines, by law, cannot compete; petitioner's rates in the trade range from 22 to 100 per cent above the 8900 lines; and these foregoing factors culminate in the conclusion that the 8900 lines and petitioner's services to shippers are materially different. Despite having the burden of proof below and before this Court, petitioner has not suggested how harmful rate instability could develop between groups which are not in substantial competition.

V.

The Commission was not bound by the Examiner's findings. It overruled the Examiner only after extensive discussion and citation of testimony and exhibits. There was no dispute as to the basic facts or data. The Commission did not ignore the Examiner but explained that the recommended decision was based on unsupported speculations and an erroneous interpretation of section 15. Petitioner, itself, no longer argues the rationale of the Examiner's decision.

VI.

This Court has held that a section 15 agreement *must* be approved unless found discriminatory, detrimental to commerce or contrary to the public interest. *Aktiebolaget Svenska Amerika Linien (Swedish-American Line) v. F.M.C.*, No. 18,554, D.C. Cir., June 10, 1965. The Commission not only found that no such harmful consequences would follow approval of Agreement 8900, but also that the Agreement affirmatively would promote American foreign commerce by establishing rate stability and assisting American exporters meet foreign competition for Persian Gulf markets.

With the exception of this final argument, this brief follows the sectional organization of petitioner's arguments.

ARGUMENT

I.

THE COMMISSION IS NOT BARRED FROM APPROVING A SECOND RATE AGREEMENT WHICH IT FINDS TO MEET SECTION 15 STANDARDS

In its Argument I, petitioner urges this Court to substitute a rule of *per se* illegality, alien to section 15, Shipping Act, 1916, for the balanced weighing of those factors expressly required by the statute itself. More specifically, petitioner contends that as a matter of law the Commission must disapprove an agreement, regardless of its merit, if there

is an existing approved agreement covering the same geographical trade area. It is significant that this case was heard and argued below on the assumption that two rate-making entites in the same trade were not unlawful *per se*. The Commission's predecessor so held in the leading case of *Oranje Line v. Anchor Line, Ltd.*, 5 F.M.B. 714, 731 (1959). Petitioner did not assert before either the Examiner or the Commission that the *Oranje* case was wrong, but rather that it was governing and that on the facts and under the applicable criteria, these two rate-making entities would be contrary to the public interest. The Commission considered the facts and ruled to the contrary (JA 24). The conference now changes tack, arguing for the first time that Agreement 8900 is unlawful *per se*.

While petitioner cites pages of legislative history, nothing cited justifies petitioner's contention: not one citation from the legislative history discusses or considers whether more than one rate-making entity per trade may exist. There is no need to resort to legislative history. The appropriate scope of inquiry under section 15 is stated clearly in the statute. As said by this Court in *Aktiebolget Svenska Amerika Linien (Swedish-American Line) v. F.M.C.*, No. 18,554, D.C. Cir., June 10, 1965:

> ". . . Congress has provided in 46 U.S.C. § 814 that such steamship conference agreements are exempt from the provisions of the United States antitrust laws when approved by the Federal Maritime Commission, that the Commission may disapprove an agreement only if it finds the agreement to be
>
> > 'unjustly discriminatory or unfair as between carriers . . ., or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter,'
>
> and that it *shall* approve all other agreements." (Slip Op. pp. 3-4) (Emphasis is the Court's).

It is striking that in its voluminous brief petitioner never discusses how any of these four criteria are violated. Instead, petitioner attempts to tie the hands of the Commission with an absolute rule of law that there can be only one Commission-approved rate agreement in a trade. Just

how, under such a doctrine, the Commission could perform its mandate to protect carriers from discrimination, provide for American commerce and protect the public interest is ignored by petitioner in its attempt to construct for itself an unprecedented type of grandfather right, a right good against all subsequent applicants no matter how much better for the public their proposed agreements might be.

Examination in context of petitioner's legislative quotations shows invariably that they were made by persons who were addressing themselves not to whether in one trade there might be simultaneously two or more complementary, conflicting, or overlapping Commission-approved agreements — but rather to other matters involving knowledge of the fact that normally one approved rate agreement in a trade area suffices. Nothing in the Shipping Act or in its legislative history translates this knowledge into a rule of law forbidding approval of more than one rate agreement per trade. Indeed, in *Oranje Line v. Anchor Line, Ltd.*, *supra*, the Commission's predecessor held:

> "Complainants contend that the approval of more than one conference in a particular trade is illegal *per se*. This contention is not supported by the language of the Act nor by its legislative history." 5 F.M.B. at 731.

Petitioner — for the first time — mistakenly characterizes this as "*dictum*." Plainly, however, it is not; it is holding, and basic holding at that. A contrary ruling would have ended the proceeding. The Board would not have had to analyze the trade and disapprove the Agreement on the basis of facts which indicated the likelihood of a rate war.[3] An even earlier case reflects the existence of two approved rate agreements (Nos. 4490 and 1456) in the same trade. See *Application of Red Star Linie for Conference Membership*, 1 U.S.S.B.B. 504, 508 (1935).

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[3] This likelihood of instability distinguishes the Oranje Line case from the case at bar. Here the Commission has found the opposite, i.e., that instability would be likely to arise if Agreement 8900 were disapproved (JA 21-22).

The Commission's unequivocal position was stated prior to the lengthy examination by Congress of shipping conferences which culminated in extensive amendments in 1961 (75 Stat. 762-766), including restatement of section 15. Surely Congress would have overruled this interpretation of section 15 had it believed it so blatantly in conflict with the legislative purpose as petitioner now contends.

The legislative history cited by petitioner is not contrary to the Commission's position. Rather, it reflects the facts of shipping life. That is, as shown in the case of the Persian Gulf trade, carriers in competition have been found to need authority to join together to eliminate destructive rate wars and instability. As noted in the "Alexander Report", H.R. 805, 63rd Cong. 2d Sess. (1914), p. 416:

> "Most of the numerous agreements and conferences discussed in the foregoing report were the outcome of rate wars and represent a truce between the contending lines."

Agreement 8900 follows this well-recognized pattern.

Generally, all carriers serving a geographical area compete and will join in the rate stabilizing agreement. This fact is reflected in the legislative comments cited. This does not create a standard of law, and it does not follow when, as here, there is no need or market justification for all carriers to join together, that Congress says they must. The fact is, the participants in Agreement 8900 are not in contention with petitioner's members requiring agreement on rates.

Petitioner makes the error of assigning some magic to the phrase "in the same trade." The argument runs, basically, since petitioner's members and the participants in Agreement 8900 serve the same littoral, they must be in the same trade area. It follows that a trade area is a trade and that the parties in such a trade must be in competition. In fact, the Commission found precisely the opposite. The parties to the two rate-making entities do not engage in substantial competition: their rate structures are entirely disperate; in sum, they are not effectively in the

same trade (JA 8-13, 16). There is nothing unusual about a rate agreement between carriers with common problems and interests. An agreement among parties without mutual problems and interests would be indeed strange.

The Commission was not precluded from investigating the needs of American commerce and the public interest merely because of a pre-existing agreement involving the same trade. The Commission, on numerous occasions, has approved pools and rate agreements based on specific needs, despite the presence of a pre-existing conference. E.g., *Alcoa Steamship Co. v. C.A.V.N.*, 7 F.M.C. 345, *affd.* 116 U.S. App. D.C. 143, 321 F.2d 756 (1963); *Agreement 8765-Gulf/Mediterranean Trade*, 7 F.M.C. 495 (1963). Also, in the *Dual Rate Cases*, 8 F.M.C. ____, 3 Pike & Fischer, Shipping Regulation Reports, 677, 712-713 (1964), the Commission denied an argument by a conference that there could not be two dual rate contracts in the same trade. In each of the cited instances, the Commission looked to the statutory standards and not to the single fact of a pre-existing approved section 15 agreement.

The 8900 carriers have proposed an Agreement which section 15 not only permits but, as shown by the legislative history cited by the petitioner, encourages: they wish to solve common problems for the purpose of preventing destructive rate competition among themselves which would impair stable rates and reliable service for American exporters. The Commission was required to consider the merits of these proposals.[4]

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[4] In any case, petitioner cannot be granted the relief it requests — disapproval — on this point. If it should be determined that the conference agreement and Agreement 8900 are mutually exclusive and the Commission must necessarily choose between them, it was error not to give proper notice of this to respondents below. Pollack v. Simonson, No. 18,862, D.C. Cir., Aug. 3, 1965. Intervenors had every right to rely upon the prior holding in Oranje, supra, that two agreements may exist in the same trade. If the law were otherwise, the conference would have been brought in as respondents and its agreement put in issue. See section 15, Shipping Act, 1916, and rules 5(a) and (d) of the Commission's Rules of Practice and Procedure, 46 C.F.R. §§ 502.61, 502.64. Remand on this issue would require further proceedings, at the least. However, in light of the Commission's decision there seems little question which agreement the Commission would have chosen in a comparative hearing.

II.

THE CHARGE THAT THE COMMISSION BOWED TO CONGRESSIONAL PRESSURE IS UNTIMELY, UNPROVEN AND IMPLAUSIBLE

Petitioner devotes considerable space to charging that the Commission subverted its own judgment and bowed to improper pressure from the Joint Economic Committee of Congress.

A. Petitioner Has Raised This Issue Too Late to Be Considered.

There is a threshold defect in petitioner's argument. The Joint Economic Committee report was released in December of 1964;[5] the Commission did not render a decision until April of 1965. The conference petitioned the Commission after its decision but *before* it issued a final order in this proceeding for the purpose of having the Commission stay any final order. Throughout this entire period, petitioner never expressed to the Commission any concern with the fact that a portion of the Committee report concerned the Persian Gulf trade. It not only had the opportunity, but an appropriate petition would have been permitted by the rules of the Commission. 46 C.F.R. §§ 502.261-264. It should not be permitted to raise this issue now. *United States v. Tucker Truck Lines*, 344 U.S. 33 (1952); *Gearhart & Otis, Inc. v. S.E.C.*, No. 18,817, D.C. Cir., June 30, 1965; *Niesloss v. Bush*, 110 U.S. App. D.C. 396, 293 F.2d 873 (1961).

The language of Justice Jackson in *Tucker Truck Lines* seems appropriate:

> "This issue is clearly an afterthought, brought forward at the last possible moment to undo the administrative proceedings without consideration of the merits . . ." 344 U.S. at 36.

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[5] It became S. Rep. No. 1, 89th Cong., 1st Sess. (1965).

In the recent *Gearhart & Otis, Inc.* decision, this Court held:

> "But since at no time before the Commission was the issue of delay raised, petitioners are precluded by Section 25(a) of the Exchange Act from raising it now.
>
> "Section 25(a) . . . provides in pertinent part: 'No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission.' This section is a common provision in federal regulatory statutes and is a codification of the exhaustion of administrative remedies doctrine . . ." (Slip Op., 3-4).

In *Gearhart & Otis, Inc.*, the petitioners could not have raised one issue until after the Commission rendered its decision. It was held that regardless of the fact no petition for rehearing is required as a prerequisite to judicial review of an action, when petitioners did not raise the issue by such a petition, they were precluded from raising it before the Court. Petitioner here had the opportunity to consider the language of the Committee report to which it now objects and to raise the issue before the Commission. Since it did not, it cannot do so before this Court.

B. The Excerpts Used by Petitioner Actually Demonstrate the Implausibility of Its Allegations.

Petitioner works the innuendo of improper committee influence two ways: first, by inferring that the Commission's Hearing Counsel surreptitiously fed the Joint Economic Committee information from the Commission proceeding; and, second, but simultaneously and inconsistently, by saying that the Committee was forcing on the Commission this information concerning the Persian Gulf trade.

Upon examination, the communications quoted to support the theory that the conduct of the Commission and the Committee was "improper" prove the contrary. Furthermore, they are not even the same kind of

special interest pleading by Congressmen which is the subject of much of the discussion by the commentators quoted by petitioner.

The conference suggests that there is something wrong in the Persian Gulf passages of the Committee report because they do not "state the source" or use an "uncited source." But Hearing Counsel's brief, a matter of public record, is cited specifically by the Committee as the source of the quotations.

As for the communications from the Committee to the Commission, the allegedly improper communications were not communications at all but, instead, made up slightly more than one page of a 45-page public report on "Discriminatory Ocean Freight Rates and the Balance of Payments," S. Rep. No. 1, 89th Cong., 1st Sess. (1965). The heading of the particular chapter of the report involved is, "Effects of Government Policy on Freight Rates." The material objected to by petitioner is from a subpart headed "1. Agency for International Development." As is clear from the last paragraph of petitioner's Appendix A, the primary agency which received the attention of the Committee was A.I.D., not the Commission, which does not even merit a heading in this chapter.

There is not a single matter of record which in any way indicates that the Commission considered this excerpt as bearing on its decision in this case.

The specific portion of the Committee report underscored by the Conference[6] does not suggest a future course of action, but reflects what had happened already in the Persian Gulf trade — three years before Agreement 8900 was proposed. Certainly, the decision of the Commission was not intended to "break-up," and has not broken up, the conference, supposedly the Committee's aim.

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[6] "It also proves that regular commercial rates are increased as the result of cargo preference laws, and if they are not checked by a conference breakup, may destroy commercial exports of the United States to a particular trade area."

The Joint Economic Committee of Congress is not foreclosed by such litigation as this from investigating and reporting on whether freight rates are being adversely affected by A.I.D.'s acquiescing in the payment from its funds of ocean freight rates higher than those charged commercial shippers.[7] Moreover, there is no showing whatever that the Joint Economic Committee, in thus performing its normal duties, intended to or did influence the Commission to reach the decision it did. Whereas the courts should be and are quick to repel all congressional attempts to influence the decisions of quasi-judicial agencies, they should be equally alert to reject such arguments as petitioner's which by innuendo and inference, not by facts of record, attempt to impugn the integrity of both the Congress and the agency.

Only two cases are cited by petitioner to support its request for a reversal on this ground. In both *F.C.C. v. RCA Communications, Inc.*, 346 U.S. 86 (1953) and *United States v. New York Central R. Co.*, 263 U.S. 603 (1924), the Court found that the agencies had utilized standards not in their statutory mandate without explaining the relation of these standards to those expressly established by statute. The cases are irrelevant, for petitioner here does not attempt to explain how the standard supposedly substituted for the agency's expertise and judgment differed from that set forth in the governing statute.

The Commission, as every page of its decision makes abundantly clear, relied on the express standards of section 15 and the facts of record — nothing more.

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7 "Even when the issue of powers or procedures has been isolated, many commentators forget that our Constitution plainly sanctions some Congressional interference with administrative action. Thus, aside from the merits of controversies, OBJECTION IS NOT APPROPRIATE

. . .

"(4) When the Senate and the House, or their committees, or individual Congressmen decide they ought to look into agency activities and make whatever comments are inspired by the inquiry." Newman & Keaton, "Congress and the Faithful Execution of Laws — Should Legislators Supervise Administrators?", 41 Calif. L. Rev. 565 (1953).

III.

THE TWO AMERICAN CARRIERS CANNOT BE HARMED AND ARE ENTITLED TO NO FAVORED TREATMENT UNDER SECTION 15

Petitioner's argument (III) that the Commission acted arbitrarily and capriciously in that its decision to approve Agreement 8900 will harm the United States merchant marine when section 15 means to promote it, rests on two false premises: first, that petitioner's members will be adversely affected by approval of the Agreement; and second, that the statute directs the Commission to favor American-flag lines over foreign-flag lines. Neither proposition is true.[8]

A. Agreement 8900 Cannot Injure Petitioner's Members.

Only one kind of action, the mutual establishment of rates, is permitted by approval of Agreement 8900. The only way such group making of rates could conceivably harm either of petitioner's members would be if it were to cause them to lose cargo or to have to reduce their rates.

There are only three things that can follow from joint agreement on rates by the 8900 lines. First, their rates may go up. Surely, this cannot serve to divert cargo currently being carred by petitioner's members or force them to reduce rates. Secondly, the 8900 lines' rates may stay the same. This clearly cannot be said to affect the conference.

The third possibility is that the 8900 lines may reduce their rates. However, the conference carriers' rates are already 22 per cent to 100 per cent higher than those being charged by the 8900 lines. It is difficult

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[8] There is a preliminary assumption which is correct, but which was not so when Agreement 8900 was submitted for approval: it is assumed that the 8900 lines operate foreign-flag ships only and that the conference lines fly only the American flag. An American-flag line originally joined in seeking approval of Agreement 8900, but it has since ceased operation (JA 6, 96). Any line, including petitioner's members, can become a party to Agreement 8900 provided only that such line serves or intends to serve the trade.

to imagine how changing this to an absurd 50 to 150 per cent could have any damaging effect upon the conference.

Further, by their own admission at least 60 per cent to 70 per cent of conference cargoes are reserved for them by preference statutes. Therefore, by law, intervenors cannot take at least 60-70 per cent of petitioner's cargo. Equally significant, during previous rate wars among the 8900 lines, when their rates actually were below present levels, the conference carriers did not reduce their rates.

Perhaps the clearest proof that the conference members cannot be injured is that they have never argued in this proceeding that Agreement 8900 is "unjustly discriminatory or unfair as between carriers," the provision of section 15 which is designed specifically to protect their interests.

Neither the Commission nor the Examiner could find a single instance of probable harm to petitioner's members from the Agreement. The record contains no testimony, no shred of evidence, specifying any shipper or cargo which might be lost by the conference lines.[9]

In *Alcoa Steamship Co. v. C.A.V.N.*, *supra*, the protesting carriers documented percentages of cargo and dollar revenues they expected to lose if an agreement were approved. They also alleged they would be driven from the trade if the agreement were effectuated. This was held insufficient to warrant disapproval. Here, there is no allegation — much less proof — by petitioner that it will lose any cargo or revenue nor does it allege its members will be driven from the trade. It simply fails to establish any injury.

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[9] Petitioner's brief implies that a third conference line, Stevenson, has been forced from the trade. Stevenson entered the trade in 1963 without considering the service of the 8900 carriers, or their effect on its business (JA 93). Stevenson departed after the record closed. The reason therefore does not appear, but there is no reason to presume that Stevenson's departure, any more than its arrival — both of which occurred before approval of Agreement 8900 — had anything to do with the 8900 lines.

Certainly as this Court said in *Alcoa Steamship Company v. F.M.C.*, 116 U.S. App. D.C. 143, 147, 321 F.2d 756, 760 (1963):

> "These findings by the Commission represent its best effort to measure the effects of the agreement in relation to petitioners. They are supported by substantial evidence in the record, and we have no basis for rejecting them without substituting our judgment in this specialized area for that of the body best qualified to exercise it."

B. Section 15 Subjects American Carriers to Equal, Not Favored, Regulation.

Petitioner's second false premise is that section 15 accords them special treatment. The legislative history cited by petitioner actually substantiates the position which has been taken consistently by the Commission on this issue. That position was stated succinctly in *Alcoa Steamship Co. v. C.A.V.N., supra,* affirmed by this Court:

> "This proceeding lies under section 15 of the Shipping Act, 1916. This section sets out the standards for approval or disapproval of agreements filed according to its terms. We here apply those standards and no others. We are not concerned here with any promotional provision of law . . ." 7 F.M.C. at 364.

It is not necessary to go beyond the legislative references in petitioner's brief to see the propriety of the Commission's position. Representative Joshua W. Alexander is quoted by petitioner as stating that the purpose of "reasonable regulation" in the proposed 1916 Act, "is to ensure American commerce fair treatment." 53 Cong. Rec. 8078 (1916). Another Congressman is quoted as stating the purpose of the bill to be "the removal of discriminations, the overthrow of unfair practices, [and] the opportunity afforded for American capital to enter the foreign-carrying trade upon terms of equal competition." 53 Cong. Rec. 8106 (1916). When it is said that American carriers will benefit, it is meant only that such benefit will accrue from equal regulation as compared to the unregulated situation which existed prior to 1916. Never did Congress

intend that shipping regulatory justice should be administered on any basis which would accord American carriers the special promotional privileges petitioner seeks herein.

The principle of equality in regulation was iterated by the architects of the 1961 amendments to the regulatory provisions of the Shipping Act. After recognizing problems in regulating foreign as well as American carriers, the Senate Commerce Committee reported:

> "Accordingly, we have sought to increase and strengthen safeguards of the public interest which may be effectively and equally enforced by the Federal Maritime Commission." S. Rep. No. 860, 87th Cong. 1st Sess. (1961), p. 3.

The fact that it is also possible for petitioner to quote legislative history of the Shipping Act, 1916, which talks of promoting the United States merchant marine is not surprising or even relevant. When that Act was adopted there were two different types of provisions included; those of a regulatory nature, presently found in sections 14 through 21 (46 U.S.C. §§ 813-820), and those for building ships and promoting American carriers, included principally in sections 3 through 13. See 53 Cong. Rec. 8078-8080 (Statement of Representative Alexander). This should not confuse the issue today. For with the enactment of the Merchant Marine Act of 1936, providing direct subsidies, trade-in privileges, tax benefits, etc. (49 Stat. 1985, 46 U.S.C. §§ 1101-1294), the promotional provisions of the 1916 Act were repealed (49 Stat. 2016).[10]

Further proof of the separation of regulation from the promotion of the American Merchant Marine is found in Reorganization Plan No. 7 of 1961 (26 F.R. 7315). Whereas, previously promotion and regulation both had resided in a single commission or board, Reorganization Plan No. 7 created the Federal Maritime Commission distinct from a Maritime Administration within the Department of Commerce and gave it

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[10] Indeed, cargo preference is one promotional provision which obviously is of substantial benefit to the conference members carrying Government cargoes at high rates.

exclusive responsibility for regulation. As stated in the President's message, H.R. Doc. 187, 87th Cong. 1st Sess. (1961):

> "The basic objective of the plan is to strengthen and to revitalize the administration of our Federal programs concerned with promotion and development of the U.S. merchant marine by concentrating responsibility in separate agencies for the performance of regulatory and promotional functions . . .
>
> "Intermingling of regulatory and promotional functions tended in this instance to dilute responsibility and has led to serious inadequacies, particularly in the administration of regulatory functions."

That there is nothing in the Shipping Act authorizing or permitting the Commission to use section 15 as a tool to promote American carriers at the expense of other carriers or the shipping public does not mean that American carriers' interests are to be ignored or that the Commission cannot aid an American carrier. This Court recognized this fact in *Alcoa Steamship Co. v. F.M.C., supra,* at 147-148, 321 F.2d at 760-761, where the " 'promotional' effect flowed from this [extraneous] circumstance rather than from any purpose on the Commission's part to favor Grace [the American-flag line] . . ." A House subcommittee, after an exhaustive review of steamship conferences, found this to be the limit to which regulation might go:

> "However, it is a mistake to assume from this that all efforts, including neglect of regulatory policy, should be made to maximize profits of American liner companies. U.S. promotional policy is spelled out in our statutes and regulations. Any attempt to broaden this policy in a manner inconsistent with regulatory policy is not only unwise but contrary to express congressional policy . . .
>
> "It is not intended that U.S. lines should . . . be treated differently under regulatory statutes . . ." *Report of the House Antitrust Subcommittee,* H.R. Rep. 1419, 87th Cong., 2d Sess. (1962), p. 26.

Petitioner suggests as a corollary to its request for promotional treatment that an agreement of exclusively foreign carriers is contrary

to section 15. There are 14 approved conferences or agreements which are composed only of foreign-flag lines (JA 85). Obviously, these rate-making bodies cannot be contrary to the public interest solely because U.S.-flag lines are not members. There are other interests such as stability and reasonable rates and service which must be considered.

The Commission's decision below shows that using its knowledge of ocean shipping, it weighed the effects of Agreement 8900 upon the American-flag carriers, intervenors, and American exporters. It found no threat to the American public interest, but quite the contrary.

IV.

THE FINDING OF FACT RELATING TO LACK OF SUBSTANTIAL COMPETITION BETWEEN PETITIONER AND INTERVENORS IS SUPPORTED BY A PREPONDERANCE OF THE EVIDENCE

A. The Facts Relating to Future Stability Are Largely Undisputed.

Petitioner attacks the Commission's determination of lack of competition between the two groups as unsupported by the facts. In this regard, it is most important to consider why it was necessary for the Commission to make this finding. The finding was that "no substantial competition" exists between the 8900 lines and the conference. This finding then supported the conclusion that the circumstances could not bring about any instability or a rate war between the two groups. Only if such instability were possible might the Agreement be found to be detrimental to commerce or contrary to the public interest. Compare *Oranje Line v. Anchor Line, Ltd., supra.* Petitioner has not explained contrary to the Commission's finding how instability — the result of substantial competition — could follow approval of Agreement 8900.

The Commission's finding of lack of competition between the two groups was based upon raw statistical data introduced by all of the

carriers including petitioner's members. It is crucial to note that petitioner does not question the accuracy of the data or the charts which the Commission constructed from them. Petitioner has not even attempted to impeach the data but has cited only two pages of the transcript and no exhibits. Without record references contradicting the Commission's findings — especially when the Commission cited the record extensively — petitioner cannot prevail on this point. In any event, we now show that the Commission's findings of lack of competition regarding ports, cargo, rates, and service are supported by the evidence.

B. Petitioner Serves Few Ports Used By Intervenors' Shippers.

Petitioner does not argue with the Commission's facts as to ports served, but now suggests a method of statistical analysis which it did not present to either the Examiner or the Commission. By equating any one conference call — such as at Al Basrah — with any number of calls by the 8900 lines — 81 at Al Basrah — they achieve a new percentage theory putatively proving constant competition. The Commission, however, did not use percentages or formulas, but actually set out the port calls for all carriers. One may use any mathematical convolution desired, but this does not change the facts as found by the Commission or what vessels shippers are using, with what frequency, to which ports. The undisputed facts are that the 8900 lines made 151 stops at ports not served by the conference, and 169 at ports visited by the conference lines only three times (JA8-10).

Petitioner raises — but does not discuss or show the significance of — two new issues never raised below. The first inquires why an antitrust standard of competitive areas, rather than ports, was not used. Petitioner did not suggest such a course to the Commission, nor has it attempted to explain here the relevancy of antitrust trade concepts to the question of stability in ocean shipping. See *Swedish American Line v. F.M.C., supra,* Slip. Op., pp. 10-11. Certainly, there is no disputing

the propriety of the Commission's use of port information as part of its inquiry into whether instability would follow approval. The second query is why September, 1962 to August, 1963 calls were utilized as standard. The answer is that the Commission did not select the period but used the data of the most recent yearly period available, furnished by agreement of the parties as typical (JA 8).

C. The 8900 Lines Are Precluded by Law From Competing For the Preponderance of Conference Cargoes.

Petitioner's statement that the conference and the 8900 lines carry "the same cargo commodities" has little bearing on the question of the extent to which the two groups compete. The important distinction — and one the petitioner seeks to obscure — is the difference between commercial cargo and cargo which, because it is financed by the United States Government, is by law reserved for American-flag vessels.[11] The 8900 lines cannot compete for these cargoes.

The Commission's statistical statements concerning this Government-sponsored "preference" cargo are correct. Petitioner seeks to impugn the Commission's findings by pointing out that the Commission states that "protestants' cargoes to the Persian Gulf were estimated to be between 60 per cent and 70 per cent Government financed," but that later it says, ". . . the conference is dedicated almost exclusively to Government-sponsored cargoes." The "estimate" made by the conference lines themselves was obviously self-serving and they never substantiated it with probative evidence (JA 12). Other facts of record indicate that the conference lines' "estimate" of 60 per cent to 70 per cent was inordinately low. For example, another American-flag line in the trade at the same time, charging the same rates, carried 98 per

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[11] See footnote 2, supra.

cent reserved cargoes (JA 88).[12] Nevertheless, for purposes of its computations, the Commission used the conference estimate.

Using the conference's own percentages, the fact is that only 10 per cent of the total commercial cargo moving could have gone on conference vessels.[13] The conference's major interest clearly is cargo which, by law, is beyond the reach of the 8900 lines.

D. A Wide Rate Differential Precludes Any Rate Competition.

The normal and most usual test of whether ocean carriers compete with each other is whether their rates are close enough to permit a choice by a potential customer. There is no dispute here that there is a wide difference between the rates of the 8900 lines and the conference rates. The differences average from 22 to 100 per cent on the most significant commodities in the trade.[14] Despite drastic rate

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[12] Additionally, Central Gulf made only one of 22 stops at a port other than Bandar Shahpur, Iran. This is primarily a port for Iranian army equipment and not a regular port of call for commercial cargo (JA 9-10). Central Gulf concedes it was offered no commercial cargo to the other port, Ad Dammam (JA 91-92). How much commercial cargo Central Gulf could carry serving primarily a military port is open to question.

[13] Conference vessels, during the yearly period, carried a total of 167,123 tons; the 30 to 40 per cent estimate would mean a total of 50,100 to 66,800 tons of commercial cargo for the conference (JA 12). In contrast, intervenors during the same period carried 603,481 tons of commercial cargo (JA 10, 11). Therefore, the conference accounts for, at most, between 9.8 and 13.1 per cent of the commercial cargo (603,481 compared to 50,100/66,800 tons). At one point, the Commission treats the conference as carrying 21 per cent of the cargo, using Government as well as commercial cargo (167,123 of 770,604 tons). This percentage should not be compared to the approximately 90 per cent of commercial cargo transported by the 8900 lines.

[14] Petitioner quibbles with the chart setting out the differentials at page 10 of the decision, suggesting that the commodities were selected — presumably without justification — by intervenors. The table was based on lists of major moving commodities submitted by all carriers, including petitioner's members, at the request of the Examiner (JA 94-95). Petitioner also alleges mathematical errors in the Commission's table, but it has not shown one.

reductions by the majority of carriers in the Persian Gulf trade during past years, the conference's only response has been a 10 per cent rate *increase* – plus a threat of a 15 per cent further increase to persons not using its service exclusively (JA 41, 92). This demonstrates that the conference does not intend to compete on a rate basis with those carriers serving the commercial shippers in the trade, the 8900 lines.[15] The conference's chief shippers – those shipping United States Government-financed cargoes – can and do pay rates which the commercial shippers served by the 8900 lines could not possibly afford.

The 8900 lines stated that they paid scant attention to rates being charged by the conference (JA 95, 96, 97). Conversely, when Stevenson, an American-flag carrier, joined the conference, it gave no "thought" to the 8900 lines' rates (JA 93). Rate competition between the 8900 lines and the conference is non-existent.

E. The Ports, Cargoes and Rates of the 8900 Lines Indicate a Different Service for Shippers.

The Commission's finding that service to shippers by the two carrier groups is different in "quantity and quality" (JA 19), is supported by the facts as to ports served, cargoes carried and rates charged. The 8900 lines provide more frequent service to more ports and at rates so much below those charged by the conference that only the 8900 lines' rates can be considered commercially competitive. It is this service to shippers which is enhanced by the Commission's approval of Agreement 8900. It is to secure just such benefits as these that agreements are permitted by section 15, Shipping Act, 1916. See the "Alexander Report,"

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[15] Referring to the Government cargoes of one of petitioner's members and other American-flag applicants for subsidy on a nearby trade route, a Maritime Subsidy Board Examiner recently has reached the obvious conclusion: ". . . to the extent these applicants carry cargoes not available to foreign-flag vessels, the applicants are not effectively competing with foreign-flag shipping." Lykes Bros. S.S. Co. et al, Docket S-153, Maritime Subsidy Board (Supplemental Initial Decision, August 25, 1965).

supra, pp. 295-303. Regardless of its attempts to redefine the meaning of competition, petitioner has offered no evidence that in approving Agreement 8900 to benefit the commercial trade, the Commission has opened a door to destructive rate competition or instability inconsistent with section 15.

V.

THE EXAMINER'S DECISION WAS BASED ON SPECULATIVE CONCLUSIONS REJECTED BY THE COMMISSION AND ABANDONED BY PETITIONER

The Commission was not bound to accept any of the Examiner's findings. Sec. 8(a) Administrative Procedure Act, 60 Stat. 242 (1946), 5 U.S.C. § 1007(a); *c.f.*, *F.C.C. v. Allentown Broadcasting Co.*, 349 U.S. 358 (1955). Nor in this case is there any merit to petitioner's argument that because one Commissioner agreed with the Examiner, his decision should be given added weight: the Commissioner who would have affirmed the Examiner neither explained why nor gave a single reason explaining the alleged error of the other three members of the Commission. In contrast, the majority and concurring opinions carefully considered both facts and law before overruling the Examiner.

The following majority findings prove that the Examiner's decision was not "ignored":

> "Underlying the Examiner's disapproval of Agreement No. 8900 is the conclusion that relations between the applicant carriers and the existing Conference carriers in the event of approval will create destructive competition which will cause unfairness between carriers, exporters, and others, detriments to commerce, and injury to the public and that applicants will be induced to rejoin or reform in the existing Conference in the event of disapproval. It is argued that the law favors only one conference in a trade, not two. The conclusion rests on treating future events that may never happen as though they had happened. Such use of unproven suppositions is

> not reasonable. Conclusions should be based on a comparison of what the record shows exists or is reasonably foreseeable based on past and present events and of the express terms of the Agreement with the conditions for disapproval stated in the second paragraph of section 15 of the Act." (JA 16, 17).

It is difficult to imagine a more precise application to the facts of this case of the standard which this Court expressed in the *Swedish-American Line* case, *supra*.

Petitioner's urging a return to the Examiner's decision seems half-hearted at best. For in its brief to this Court petitioner has abandoned the rationale upon which the Examiner based his decision. As just quoted, that rationale was that the Agreement should be disapproved, not because of any undesirable result which would flow from its approval, but because the Examiner hoped this would force the nonconference carriers to join the conference (JA 54-55, 58). The Commission properly dismissed such reasoning as irrelevant to whether it could be found that any activities contemplated under Agreement 8900 required disapproval. Although the conference argued the point before the Examiner[16] and the Commission,[17] it has now abandoned it for, we assume, the good reasons stated by the Commission in its majority and concurring opinions.

Thus petitioner has offered no alternative to the picture of the trade as found by the Commission. It raises no issue of credibility. The needs of American exporters, the rate differential, and the unlikelihood of Agreement 8900's affecting the conference carriers are fully substantiated and hardly denied by petitioner. These are factors which the Commission, not an Examiner, has primary competence to weigh.

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[16] See the conference's opening brief, January 17, 1964: ARGUMENT II. "THE APPROVAL OF AGREEMENT 8900 WILL DECREASE THE CHANCES OF FORMING A STRONG CONFERENCE IN THIS TRADE."

[17] See the reply of the conference to exceptions, April 13, 1964: ARGUMENT I. "THE APPROVAL OF THE AGREEMENT WOULD PREVENT AND APPRECIABLY DIMINISH THE POSSIBILITY OF THE INDEPENDENT LINES REJOINING THE CONFERENCE."

VI.

APPROVAL OF AGREEMENT 8900 WAS COMPELLED BY ITS BENEFITS TO AMERICAN COMMERCE

A section 15 agreement must be approved unless the record establishes that it contravenes one of the standards of section 15. *Swedish-American Line v. F.M.C., supra.* However, intervenors, as proponents below, did not rely upon the fact that the burden of proving Agreement 8900 unapprovable rested on the conference. Nor did the Commission stop where it might, *i.e.*, with the finding that no detriment to the commerce of the United States had been shown to flow from Agreement 8900.

The 8900 lines have expressed the purpose of their Agreement to be to minimize possibilities of a rate war and to promote the stability needed by American exporters:

> "We formed that Agreement, or we propose this Agreement realizing that it would help avoid the dangers of extreme competition or rate wars in a trade which is over-tonnaged. We also did it because we felt that by doing so the independent lines could discuss rate matters, could go to their shippers and mutually find out what were the acceptable rates both from the viewpoint of the shipper and from the steamship line in the trade" (JA 86).

The Commission, for obviously sound reasons, endorsed this approach. The Commission might have rested its ultimate conclusion that Agreement 8900 should be approved on the sole fact that the conference carriers would not be harmed. It did not do so. Petitioner neglects to meet the conclusion by the Commission that even if the speculative detriment to the conference were a fact, the benefits to American exporters of Agreement 8900 are so important as to make its approval a matter in support of the public interest (JA 23).

Prior to approval of Agreement 8900 there was no forum for most of the shippers to use in discussing and arriving at rates which they could be assured would be instituted by those lines seeking to serve

commercial shippers. Each carrier could not be sure that a rate reduction by its competitors to meet a shipper's request was not the opening shot in a rate war. Unlike the conference vessels, the 8900 lines' vessels leave with space available for more cargo — the greatest temptation for destructive rate competition.[18]

Both the Examiner and the Commission found that the Persian Gulf trade was "volatile" (JA 44) and "unstable" (JA 21-22). The conference admitted that the danger of a destructive rate war among intervenors is "ever present" (JA 59). The Commission, like the 8900 lines, views the Agreement as a means of eliminating or rationalizing these problems, and at rates low enough for American exporters to compete with their foreign competitors.

Section 15 was enacted to guarantee exporters relatively stable rates over substantial periods of time and to enable shipowners to establish regular services from the United States carrying cargo at rates permitting American exporters to compete successfully with foreign merchants. See "Alexander Report," *supra*, at p. 298. This purpose alone gives the Commission's action a "reasonable basis in law." *Alcoa Steamship Co. v. F.M.C.*, *supra*, at 149, 321 F.2d at 762.

The affirmative findings by the Commission that the "rate stabilizing influence of Agreement No. 8900 is, therefore, in the public interest . . . [and] will serve the immediate needs of the trade" (JA 27) (Concurring Opinion), and will achieve the "objective of enabling United States merchants to compete better in the Persian Gulf area" (JA 23), are based on experience manifestly lying within the special knowledge of the Commission. It is its position to be aware of the realities of ocean shipping, the needs of shippers and carriers and the effect of rate agreements. No balanced considerations whatever for overturning its judgment have been offered.

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[18] "Congress has recognized that, without such agreements, competition could become so destructive as to wreck the carriers." Swedish American Line v. F.M.C., supra, at 3.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Federal Maritime Commission's report and order should be affirmed and this petition denied.

Respectfully submitted,

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